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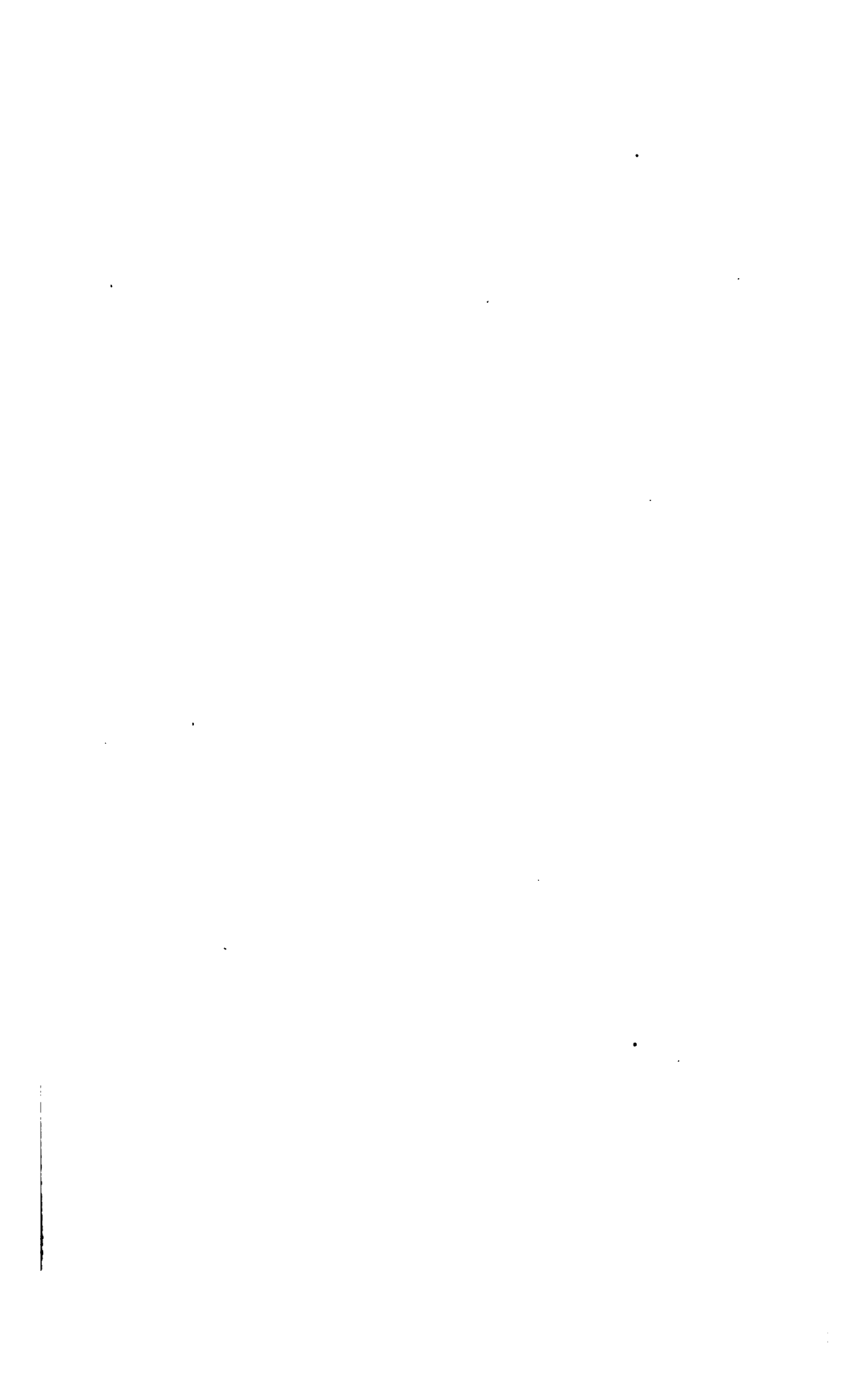












REPORTS OF CASES
DECIDED IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES. *Circuit Court.*
FOR THE
(NINTH CIRCUIT)

REPORTED BY
L. S. B. SAWYER,
COUNSELOR AT LAW.

VOLUME VI.

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J U D G E S
OF THE
U. S. CIRCUIT AND DISTRICT COURTS,
FOR THE NINTH CIRCUIT.

HON. STEPHEN J. FIELD, •

Justice of the Supreme Court allotted to the Circuit.

HON. LORENZO SAWYER,

Circuit Judge.

DISTRICT JUDGES.

HON. OGDEN HOFFMAN, . . District of California.

HON. MATTHEW P. DEADY, . . District of Oregon.

HON. EDGAR W. HILLYER, . . District of Nevada.

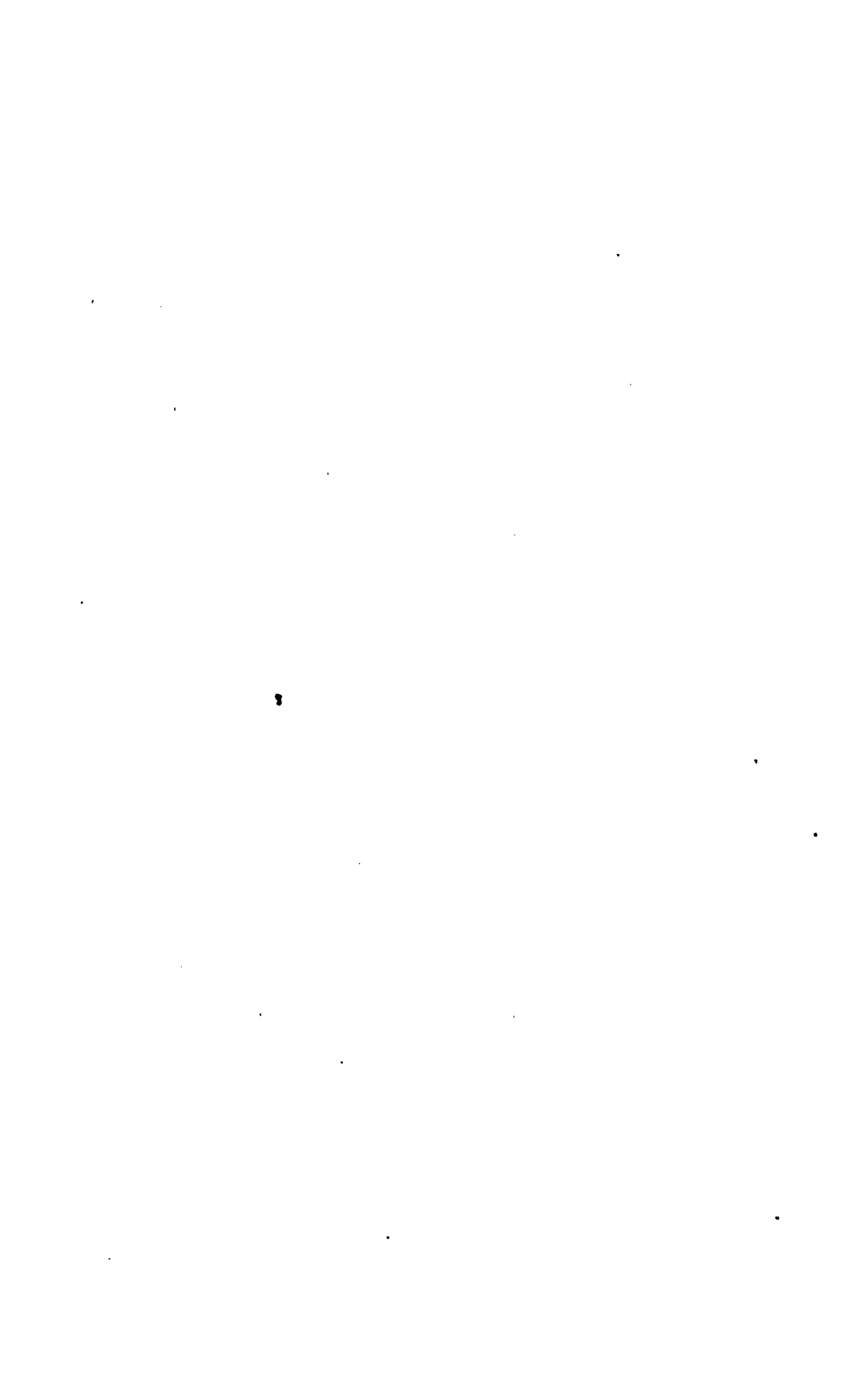


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DECISIONS
OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES, FOR THE NINTH CIRCUIT.

THE UNITED STATES v. JOHN LEATHERS.

DISTRICT COURT, DISTRICT OF NEVADA.

JULY 1, 1879.

1. INDIAN COUNTRY.—The laws of the United States extending the laws regulating intercourse with Indian tribes over the tribes in Utah, Nevada at the time of their passage being a part of Utah, do not make Nevada Indian country.
2. RESERVATION.—The tract of country called the "Pyramid Lake Indian Reservation" has been set apart by competent authority for the use of the Pah Utes and other Indians residing thereon.
3. SAME.—It is Indian country within the meaning of sections 2133 and 2139 of the R. S.
4. INTENT.—Where the statute contains nothing requiring acts to be done knowingly, and the acts are not *malum in se*, nor infamous, but only wrong because prohibited, a criminal intent need not be proved. The offender is bound to know the law, and obey it, at his peril.

Before HILLYER, District Judge.

THE facts are stated in the opinion.

Charles S. Varian, for plaintiff.

Robert M. Clarke, for defendant.

HILLYER, J. This is a criminal case in which the indictment charges the defendant with attempting to reside as a trader, and to introduce goods and to trade in the Indian country without a license, in violation of section 2133 of the

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R. S., and also with introducing liquor into the Indian country, contrary to section 2139.

The indictment alleges this Indian country to be the Pyramid Lake Indian reservation.

Special issues of fact were by agreement of parties submitted to the jury, and the United States attorney now moves for judgment on the facts found by the jury. The questions in the case are:

1. Whether the now state of Nevada is Indian country in the sense of the sections above mentioned.

2. Whether the tract of country called the "Pyramid Lake Indian reservation" has ever been set apart by competent authority as an Indian reservation.

3. Whether, admitting it is an Indian reservation, it is Indian country in the sense of the laws of congress; and,

4. The jury having found the defendant's place of business to be outside the lines of the reservation, as shown on the ground by certain posts set up by the Indian agent and certain stone monuments set up by the surveyor, but within the limits as established by the executive order, whether the defendant is guilty of the offense charged.

Upon the first point it is argued on behalf of the United States that the whole state of Nevada is Indian country by virtue of the Indian intercourse act of 1834 (4 Stat. 729), and section 7 of the appropriation act of 1851 (9 Stat. 587), which enacts "that all the laws now in force regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby extended over the Indian tribes in the territories of New Mexico and Utah," Nevada, at that time being a part of Utah; and also by virtue of section 16 of the act of March 2, 1861, organizing the territory of Nevada, and section 11 of the act of March 21, 1864, enabling the people of Nevada to form a state, extending the laws of the United States not locally inapplicable over the territory and state of Nevada respectively.

It seems to me apparent that these enactments did not and do not make either the territories of Utah or Nevada or the state of Nevada Indian country. The act of 1834,

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which in 1850, contained nearly all the law regulating intercourse with Indians, defines the term Indian country and fixes its boundaries. Utah was not then part of the United States, and did not become Indian country by the act of 1834. (*U. S. v. Tbm*, 1 Or. 6; *U. S. v. Seveloff*, 2 Sawyer, 311.)

The act of 1851, extending the laws regulating intercourse with Indian tribes over the Indian tribes in Utah, does not in terms certainly make Utah Indian country. Certain laws which before that enactment had been confined in their operations to the country described and designated as Indian country by those laws, were extended over the tribes in Utah. The provisions of law applicable to those tribes may be enforced without first being obliged to declare the territories in which those tribes live Indian country. The laws, too, are extended over the *tribes* and not over any specified territory. So that intercourse with those tribes is regulated even after the territory and state of Nevada has been set off from Utah. The general provisions extending the constitution and laws over Nevada, if they are to be regarded as extending the intercourse laws so far as applicable over the state, do not make it Indian country, but only give force to laws which before were confined to the Indian country as defined by congress.

In my judgment, then, Nevada is not Indian country. If, however, it is admitted to be such it would hardly be necessary to make any argument to show that the sections under which the defendant is prosecuted, are not applicable to the tribes in Nevada outside of the Indian reservations.

The defendant, in one count, is charged with attempting to reside and trade in the Indian country. If Nevada is Indian country, then every trader and every man who introduces goods here is liable to the penalty, unless he has a license from an Indian agent. This is, of course, absurd. The organization of the state and its admission into the union require population. Congress has invited all citizens to explore the public mineral lands, and to make homes upon the agricultural lands. Traders must come with the rest, and goods must be introduced. It is the same as to

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the charge of introducing liquor into the Indian country. All over the state, dealers in spirituous liquors are licensed by the United States, and revenue thus collected. If Nevada is an Indian country, every liquor dealer therein is guilty of a violation of section 2139. It was argued that these sections were so far applicable here as trade with the Indian tribes themselves is concerned. But the answer is, that trading and introducing liquors into the Indian country are offenses which are complete without alleging or proving any dealing directly with the Indians.

We are next to determine whether the Pyramid Lake Indian reservation is legally an Indian reservation. It is said in behalf of the defendant that there is no law of congress setting it apart or giving the president authority to do so. The United States attorney claims that the reservation has been legally established by the following executive order inscribed upon a diagram purporting to be a map of the Pyramid Lake Indian reservation, viz.:

“EXECUTIVE MANSION, March 23, 1874.

“It is hereby ordered that the tract of country known and occupied as the Pyramid Lake Indian reservation in Nevada, as surveyed by Eugene Monroe in January, 1865, and indicated by red lines according to the courses and distances given in tabular form on accompanying diagram, be withdrawn from sale or other disposition and set apart for the use of the Pah Ute and other Indians residing thereon.

“(Signed)

U. S. GRANT.”

In *Walcott v. Des Moines Co.*, 5 Wall. 681, it was held that land reserved from sale by the secretary of the interior for the special purpose of aiding in the improvement of the Des Moines river, and continued by the president and cabinet, was reserved by competent authority for that special purpose. The power of reserving lands is spoken of as a power which has been exercised ever since the establishment of the land department down to the present time.

In *Grisar v. McDowell*, 6 Wall. 363, the land in question had been exempted from sale and reserved for public purposes by an order of the president. The court say, “from

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an early period in the history of the government, it has been the practice of the president to order "lands to be reserved from sale and set apart for public purposes, and that numerous acts of congress recognize the authority of the president in this respect as competent authority.

In that case the reservation was used for military purposes, but establishing a reservation for Indians is equally for a public purpose, and both these cases are authority in support of the legality of the president's order setting apart the reservation in question in this case.

No direct authority to the president to reserve lands and set them apart for public purposes is found in either case, but in each the president's authority is recognized by acts of congress which proceed upon the ground that he has it, and that the reservations so made are made by competent authority.

For instance, the act appropriating money for the Indian service in Nevada, in 1878, appropriates money for the support and civilization of Indians located on the Pyramid Lake reservation. (20 Stat. 85.) The same provision occurs in 1879, 20 Stat. 314, congress thus recognizing the reservation in question by name.

Again, in 1874, money is appropriated to assist the Indians in Nevada to locate in permanent abodes. By section 462 of the R. S. the commissioner of Indian affairs "shall, * * * agreeably to such regulations as the president may prescribe, have the management of all Indian affairs and all matters arising out of Indian relations." Again, section 465: "The president may prescribe such regulations as he may see fit for carrying into effect the various provisions of any act relating to Indian affairs."

Many other acts of congress might be cited of like tenor, but these show, it seems to me, enough to warrant and require the conclusion that the Pyramid Lake reservation has been established by competent authority.

The very extensive powers given to the president by sections 462-465 in the management of Indian affairs might well be held to include the power to establish a reservation if there were no other acts in relation to the matter. The

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authority given the president to set apart five military reservations for Indian purposes by the act of March 3, 1852, had especial reference to the Indians in California. (10 Stat. 238, 332, 699, and 13 Stat. 39.) But were this not so, the repeated recognition by congress of the reservations established in Nevada by the president would be enough, along with the general powers given the president in Indian affairs to show his authority.

The third point made by the defendant is that if this be an Indian reservation it is not "Indian country," as that term is used in sections 2133 and 2139 of the R. S.

It must be conceded that there is no act of congress making the reservation in terms "Indian country," and that it is not within the boundaries established by section 1 of the act of 1834.

A large portion of the act of 1834 is included in the R. S., but section 1, defining the boundaries of the Indian country, is not. The act of 1834 is therefore repealed by section 5596, R. S., and section 1 not being incorporated into the R. S. is repealed also, unless it is a provision of a "private, local, or temporary character," and so by virtue of the proviso to section 5596, still in force.

Section 1 is in these words: "Be it enacted, that all that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river and not within any state, to which the Indian title has not been extinguished for the purposes of this act, be taken and deemed to be the Indian country." (4 Stat. 729.)

This is neither private nor temporary, certainly. Then is it local?

The act of which it is a part is entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

This title indicates an act of a general and permanent character, and not local and temporary.

Although the first section defines Indian country, it is not restricted in its operation to that locality. It is, it

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seems to me, a part of the general law applicable everywhere in the nation as a definition of Indian country.

The case of *Bates v. Clarke*, 5 Otto 204, arose before the adoption of the R. S., and before December 1, 1873, while section 1 of the act of 1834 was in force, and can not be regarded as recognizing the definition of Indian country in that statute as still a part of our law.

I consider that the provisions of section 1 of said act are not within the proviso to section 5596, R. S., and must therefore be considered as repealed. It seems to me that the changed condition of the region embraced in that definition of Indian country no doubt induced congress to leave it out as no longer applicable.

There is, then, if I am right in this, no longer any statutory definition of Indian country, and at the same time the term is retained in a number of important sections of the R. S., and the question is, to what does the term now apply, and does it include an Indian reservation?

As early as July 22, 1790 (1 Stat. 137), congress used the expression "Indian country," in the first act "to regulate trade and intercourse with Indian tribes." No definition of it is given, but the tenor of the act shows that it was used as meaning country belonging to the Indians, occupied by them, and to which the government recognized them as having some kind of title and right. In the next act of 1793 (1 Stat. 329), Indian country and Indian territory are used as synonymous. The act of 1796 fixed a line, according to Indian treaties, from Lake Erie down to St. Mary's river, and speaks of the country over and beyond said boundary line as Indian country. (Sec. 16, 1 Stat. 459.) The act of 1799 (1 Stat. 743) fixed the same line, and prescribed a penalty for crossing or going within the boundary line to hunt, etc., or driving stock to range on "any lands allotted or secured by treaty with the United States to any Indian tribes." The territory over the line is called "Indian country." In some sections territory belonging to Indians is spoken of. So the act of 1802 (2 Stat. 139) uses the words Indian country and Indian territory as meaning the same thing, and in both instances it is the country set apart by treaties or otherwise

for the Indians—lands to which the Indian title had not been extinguished. By the act of 1816, foreigners are excluded from any country allotted to Indian tribes secured to them by treaty, or to which the Indian title has not been extinguished. By the act of 1822 (3 Stat. 682), the president was authorized to cause to be searched the packages of traders suspected of carrying ardent spirits into the Indian countries, in the plural. Next comes the act of 1834, defining Indian country, particularly in its first section. Section 9 of the appropriation act of March 3, 1865 (13 Stat. 563), authorizes certain agents residing in said territory to sell cattle for the tribes under certain regulations. The context shows that by Indian territory is meant the country south of Kansas known by that name. When this section is incorporated into the R. S., it is the same except the words Indian territory have become Indian country. In section 8, making it a felony to drive cattle out of the Indian territory, the same change occurs. (R. S., secs. 2127-2138.) Chapter 4, of title 28, R. S., is headed "Government of Indian Country" (not the Indian country). In the act of 1863 (12 Stat.) this occurs: Treaties may be made with tribes residing in the country south of Kansas and west of Arkansas, commonly known as the Indian country. In Nevada there are four tribes of Indians. The Pah Utes, Shoshones, Washoes, and Goshutes. So far as I can discover, no formal written treaties have ever been made with any of these, except the Shoshones (18 Stat. 689), and in that there is no cession of Indian title, though there is a sort of recognition of some right to the soil in the Indians. Section 2 of the act of 1856 (11 Stat. 80) provides that if any person removed from the Indian country shall return or be found in the Indian territory, etc. In section 2148, R. S., Indian territory is changed to Indian country.

Reference to these various statutes in which the words Indian country and Indian territory have been used, is made that it may be seen in what senses congress has used the words before the revision of the statutes. The act of 1834, as interpreted in *Bates v. Clark*, fixed plainly the boundaries of Indian country. But in this case the

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R. S. must control, and in them there is no definition of Indian country. What led to the omission of section 1 of the act of 1834 from the R. S. was no doubt the consideration that it was no longer applicable to the present state of things—was, in fact, obsolete. From the earliest period of our history the boundaries of the Indian country have been narrowing. It has been done by the encroachments of the white races. For many years, up to March, 1871, the policy of the United States had been to make treaties with the various Indian tribes, and in them to adjust the claims of the various tribes to the soil, extinguish the Indian title to the same, and set apart tracts of country by metes and bounds for the exclusive occupation of the tribe making the treaty. In some instances, as in case of the Cherokees, Creeks, Choctaws, etc., the tribe acquired a fee-simple title to the lands set off to them, except that it reverted to the United States whenever the tribe should become extinct.

The policy has been to separate the Indian tribes from the rest of the people, and to set apart for their exclusive use specific portions of the public domain. The statutes cited show that Indian country is the term used generally to describe country in the occupation of the Indians, to which their title or right of occupancy—a right always hitherto recognized by the United States—has not been extinguished.

At the time the R. S. were adopted, all the country, except the Indian territory proper, embraced by the definition of Indian country in the act of 1834, was organized into states and territories to which the world generally was invited to come and settle. The same was true of all that portion of the United States lying west of the Rocky mountains. So far as I can ascertain, all the tribes, certainly all the tribes of note, within this vast territory, have been, either by treaties or agreement, dealt with by the government. The tribes, in consideration of money, goods, annuities, etc., have ceded their right to the occupation of the regions over which they had been roaming and hunting, and have had a specific portion of land or territory, or

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country allotted to them for their exclusive use, called Indian reservations. On these it was, and is, the policy, so far as possible, to induce the tribes to settle permanently and cultivate the soil as a means of living, in lieu of their former roaming life, hunting and fishing.

This is the general situation of Indian affairs. It follows that unless these various Indian reservations are Indian country, and if we are still bound by the definition in the act of 1834, there is little or no country to which the various sections of the R. S. for the government of the Indian country can apply. But if we regard section 1 of the act of 1834 as repealed, and these portions of the public lands allotted to the use and occupation of the Indians as Indian country, the sections of the R. S. in which those words occur will have such operation as to carry out what I think congress intended should be accomplished by their adoption. It is as important now as ever that the introduction of liquor into the reservations set apart for the Indians should be prevented, and trading and settling among them also. I am constrained to adopt this as the true construction of the present law, and therefore hold the Pyramid Lake Indian reservation to be Indian country.

The remaining question relates to the finding of the jury, that the defendant's place, though within the red line on the map, is without the monuments put up by Monroe, the surveyor, and outside of the posts set up by order of the Indian agent, Bateman.

The true result of the verdict of the jury is to establish the trading post of the defendant a half mile or more within the reservation. The language of the executive order on the map is such that the courses and distances mentioned must control. They are on the map, and a part of the order, so that the boundaries of the reservation are those courses and distances as indicated by the red lines on the diagram or map.

No reference is made in the order to either natural or artificial boundaries, and, therefore, neither the monument nor the wooden posts can control the courses and distances. The survey was made by triangulation, and the monuments

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were set upon mountain peaks for the most part; these are at the angles of the survey, and where they are not marked by a stone monument, a peak itself is the substitute.

At one time, by Bateman's order, he being Indian agent at the time, one Fraser set up a line of wooden posts marked "Pyramid Lake Indian reservation." Fraser said he was told to put them up as near the line as he could. The defendant's place being, in fact, within the reservation, the only bearing these facts—that he was outside the line as shown by the monuments and posts—can have, is in regard to his intent.

I take it for granted that the defendant thought he was outside the reservation line, and that he came to this conclusion because of the posts, and the line as it appeared to be marked by the mountain peaks.

The act of the Indian agent, or his subordinate, Fraser, in setting up the posts was, so far as fixing a boundary line of the reservation is concerned, beyond the scope of the authority of either, and of course so far void, and in no way binding the government by estoppel *in pais*, or otherwise.

The defendant is charged with trading in the Indian country in one count, and with introducing liquors there contrary to the statutes of the United States in another. The statute contains nothing requiring these acts to be done knowingly. The acts themselves are not *malum in se*. The object of the law is not to punish men for these acts as crimes so much as to prevent trading and intercourse with the Indians otherwise than as the law permits. There is nothing infamous in the punishment prescribed. Under these circumstances I think it is immaterial with what intent the acts were done. They belong to that class of acts which, in the absence of the statute, might be done without culpability (3 Greenl. Ev., sec. 21), and being, such ignorance of the lines of the reservation will not excuse, nor will a sincere belief by the defendant that he is outside the lines. He is bound to know the facts and obey the law at his peril. (Id.; *Regina v. Woodrow*, 15 Mee. & W. 404; *Attorney-General v. Lockwood*, 9 Id. 378; 1 Bish. Crim. L., 4th ed., 1031, etc.)

In the case of *United States v. Susan B. Anthony*, the de-

fendant was charged with illegal voting. The case was tried by Mr. Justice Hunt, and although it appeared that the defendant sincerely believed she had a right to vote, it was held that this did not excuse her. So on the trial of the inspectors of election for receiving her vote, they proved their good faith, but their ignorance of the want of proper qualifications was held to be no excuse. (Cited in sec. 82, Whart. Crim. L.)

In the case of *Commonwealth v. Mash*, 7 Metc. 472, a woman who honestly believed her first husband to be dead was convicted of bigamy, he not being in fact dead when she married the second man. In this case sentence was reserved and a full pardon obtained. The same doctrine is maintained in England. (3 Whart. 84.) So in *State v. Ruhl*, 8 Iowa, the defendant was not allowed to prove that he believed, or had good reason to believe, the girl he enticed away was over fifteen, the law confining the offense to girls under that age. The same principle was asserted in *Regina v. Alifler*, 10 Cox C. C. 402, one judge saying a man dealt with the girl at his peril, and that it made no difference that the girl told him she was over sixteen.

The following cases are cited in section 8, 3 Whart. Crim. L.: It is no defense to an indictment for voting without the proper qualifications, that the defendant believed he had them. No matter how honest his belief is, unless the statute excepts cases of honest belief. To an indictment for publishing a libel, it is no defense that the defendant did not know of the publication. Nor to one for selling liquors to a minor, that the defendant believed the vendee to be of full age. Nor to one for abduction, that the motives were philanthropic, or that the defendant mistook the girl's age.

In this class of cases the offending party is subjected to the penalty for the act done irrespective of his intent, as in civil cases he is required to answer for an act which injures another, however innocent of intentional wrong he may be. My conclusion is, that defendant must be adjudged guilty on both counts. The belief of the defendant in connection with the acts of government agents in setting up the posts can only be considered to determine whether a prosecution

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shall be begun in the first place, or the degree of punishment in case of conviction, or as ground for a pardon or remission of the forfeitures and penalties.

The defendant, Leathers, is therefore adjudged guilty of the offenses charged, and will appear for sentence.

Affirmed on appeal to the circuit court.

UNITED STATES v. JOHN STURGEON.

DISTRICT COURT, DISTRICT OF NEVADA.

JULY 1, 1879.

SECTION 2147, R. S., TITLE "INDIANS," CONSTRUED.—The president having set apart the Pyramid Lake reservation for the use of Indians, the whites who go upon the reservation to fish, do so "contrary to law," within that section.

Before HILLYER, District Judge.

Charles L. Varian, for plaintiff.

Robert M. Clarke, for defendants.

HILLYER, J. The defendants, nine in all, are charged with returning to the Indian country, after having been removed, in violation of section 2148, R. S.

The special verdict and agreed facts show that these men were engaged within the limits of the Pyramid Lake Indian Reservation, fishing, and dealing and trading in fish; that they were, by order of the proper authorities, removed from the reservation, and that thereafter they returned and resumed their former business of fishing.

That the reservation is Indian country, has just been decided in the case of *United States v. Leathers*.

The only point not decided in that case material here is this: It is argued that taking fish inside the reservation is not unlawful; that the superintendent of Indian affairs has no power to decide what is contrary to law, or who is within the reservation contrary to law, under section 2147, or without authority of law, under section 2149, and that the return after removal, to continue a lawful occupation, is no offense.

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If this argument is sound, the whole purpose of the law, in setting apart lands for the separate use of the Indians, is defeated.

It has been shown in the *case of Leathers*, that very large powers and discretion in the management of Indian affairs have been committed to the president, secretary of the interior, commissioner of Indian affairs, and other agents.

It may be added, that by section 2131 of the R. S. a superintendent of Indian affairs is authorized to revoke the license of any person whenever in his opinion it is improper to permit such person to remain in the Indian country. By section 2147 the superintendent, agents, and sub-agents have authority to remove from the Indian country all persons found therein contrary to law. By section 2149 the commissioner of Indian affairs is authorized and required, with the approval of the secretary of the interior, to remove from any tribal reservation any person who in the judgment of the commissioner may be detrimental to the peace and welfare of the Indians.

The military force may be used to remove such persons. I think these sections show that whether it is proper to permit a trader to remain in the Indian country, or whether any person is detrimental to the welfare of the Indians, are questions left in the one case to the superintendent of Indian affairs, and in the other to the commissioner and secretary of the interior. The courts will not review their decision in these matters, and the party removed, if he feels himself aggrieved, must seek redress by other means than a return to the reservation in defiance of the authority removing him.

But there is to my mind another good reason for holding that the present defendants were found in the Indian country contrary to law, when they were found established on the reservation engaged in the business of fishing, *i. e.*, catching them for sale.

The president has set apart the reservation for the use of the Pah Utes, and other Indians residing thereon. He has done this by authority of law. We know that the lake was included in the reservation, that it might be a fishing-ground for the Indians. The lines of the reservation have been

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drawn around it for the purpose of excluding white people from fishing there, except by proper authority. It is plain that nothing of value to the Indians will be left of their reservation if all the whites who choose may resort there to fish. In my judgment, those who thus encroach on the reservation and fishing ground violate the order setting it apart for the use of the Indians, and consequently do so contrary to law.

Hunting and trapping in the Indian country constitute, under section 2137, an offense; but these things are by no means the only ones it is unlawful to do in the Indian country.

The reservation having been set apart by competent authority for the use of the Indians, anything which deprives them of that use is unlawful and contrary to law. When the defendants established their fisheries on the shores of the lake, they, contrary to law, appropriated to their own use a portion of that which the United States, acting through its duly authorized agents, had set apart for the use of the Pah Utes and other Indians. Therefore, I think that without reference to section 2149, these defendants were found within the Indian country contrary to law, within the meaning of section 2147; that they were properly removed, under the orders of the president and secretary of the interior; and that by their return they have committed the offense defined in section 2148 of the R. S., as charged in the indictment.

They are all consequently adjudged guilty, and must appear for sentence July 15, 1879.

Affirmed on appeal to the circuit court.

THOMAS SAYLES v. OREGON CENTRAL RAILWAY CO.

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 28, 1879.

1. LIMITATIONS.—Under section 721 of the R. S., the state statute of limitations applies to actions in the national courts, except where the laws of the United States otherwise provide.

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2. SAME—PATENT CASES.—The limitation contained in section 55 of the patent act of July 8, 1870 (16 Stat. 206), was repealed by operation of section 5596 of the R. S., but as to all actions and suits upon causes arising before said repeal—June 22, 1874—said limitation was continued in force by section 5599 of the R. S., and therefore an action to recover damages for the infringement of a patent before June 22, 1874, is not within the operation of the state statute of limitations.
3. AMENDMENT OF STATUTE.—*Semble* that under section 22 of article IV of the constitution of the state of Oregon, a section of a statute can not be amended by simply repealing a clause or subdivision of it, and that therefore subdivision 5 of section 6 of the Oregon Civil Code, in which six years are given to bring this action, is still in force notwithstanding the attempt to repeal the same by the act of October 22, 1870. (Ses. L. 34.)

Before DEADY, District Judge.

Addison C. Gibbs, for the plaintiff.*Joseph N. Dolph*, for the defendant.

DEADY, J. This action was brought to recover damages for the unlicensed use of a patented railway car-brake.

The complaint states that the invention was patented to one Henry Tanner for the period of fourteen years on July 6, 1852, and afterwards, on July 6, 1866, the patent was extended for seven years; that on July 13, 1854, Tanner assigned the patent and extension for certain parts of the United States, including Oregon, to the plaintiff; and that the defendant, between July 6, 1871, and July 6, 1873, did make and use said brake in violation of said patent and the assignment aforesaid, to the damage of the plaintiff, four hundred and seventy-five dollars.

The defendant demurs to the complaint, and substantially alleges that the cause of action is barred by lapse of time. Section 55 of the patent act of July 8, 1870 (16 Stat. 206), provides that the circuit courts of the United States shall have cognizance of all actions arising under the patent laws, and that all such actions "shall be brought during the term for which the letters patent shall be granted or extended, or within six years after the expiration thereof."

In the R. S. said section 55 is re-enacted as section 4921, less the limitation clause above quoted, which was repealed by operation of section 5596 of the R. S. Section 721 of the

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R. S. re-enacts section 34 of the act of September 24, 1879, making the laws of the several states "rules of decision in trials at common law," except where the laws of the United States otherwise provide. Under this section it has been uniformly held that where congress had not otherwise specially provided, the state statute of limitations applies to actions in the national courts.

It follows from this statement of the case, that unless there is a saving clause in the repealing provisions of the R. S., the only statute of limitation now, or since June 22, 1874, applicable to this class of actions, is that of the state. Upon the assumption that there is no such saving clause, the defendant contends that this action is barred by subdivision 1 of section 8 of the Or. Civil Code, which limits the time for the commencement of the actions therein enumerated to two years from the time the cause of action accrued.

But there is a serious question whether the state statute does not give six years in which to bring this action. Originally, the clause in subdivision 1 of section 8 concerning actions for any other "injuries to the person or rights of another," under which it is sought to bar this action, was contained in subdivision 5 of section 6, that gives six years in which to sue upon causes of action therein enumerated. By the act of October 22, 1870 (Ses. Laws, 34), it was attempted to amend both sections 6 and 8 of the code by simply repealing subdivision 5 of the former, and repealing and re-enacting the latter, so as to include in subdivision 1 thereof the cases before then provided for in said subdivision 5, and thereby reduce the time within which actions might be brought thereon from six years to two.

It can hardly be doubted that this attempt to amend said section 6 by simply repealing a certain portion of it, is in direct violation of section 22 of article IV of the constitution of the state, which provides, that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

Now, although section 8 may have been properly amended,

yet if section 6 was not, then subdivision 5 thereof is still in force; wherefore the result is that there are two periods of limitation in the statute for actions of this kind—one for six years, and the other for two. In such a case, the plaintiff may avail himself of the longer period, and the shorter is practically a nullity.

But I think there is no reasonable doubt that section 5599 of the R. S. contains a saving clause by which the limitation in section 55 of the act of 1870, *supra*, is continued in force for the purposes of this action. It reads: "All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures embraced in said revision and covered by said repeal, shall not be affected thereby, but all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made."

It is difficult to conceive of anything plainer or more comprehensive than this. Read simply with reference to this case, it provides that any act of limitation applicable to actions for the infringement of patents embraced in the R. S., or covered by the repealing clauses thereof, shall not be affected thereby, but all such causes of action arising prior to said repeal may be commenced and prosecuted as if said repeal had not been made, which would be at any time within six years from the expiration of the patent or the extension thereof.

Counsel for the demurrer cites *Sayles v. The R. P. & P. Railway Co.*, 11 Legal News, 281, in which it seems to have been assumed that the limitation clause in section 55 of the act of 1870, *supra*, was unqualifiedly repealed by the R. S., and that therefore the limitation in actions and suits for the infringements of a patent, since June 22, 1874, under section 721 of the R. S., is to be found in the law of the state where the same is brought. But as in that case the suit was not barred by either the national or state statute, it was not material to inquire further; and, in fact, the atten-

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tion of the court does not appear to have been called to section 5599, *supra*, which, as has been shown, expressly provides that actions and suits upon causes arising before the revision and repeal of June 22, 1874, "may be commenced and prosecuted within the same time, as if said repeal had not been made."

The demurrer is overruled.

WILSON SEWING MACHINE CO. v. T. J. MORENO ET AL.
SAME v. SAME.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 18, 1879.

STIPULATION FOR ATTORNEY'S FEE.—A stipulation to pay a reasonable attorney's fee to the plaintiff in case a promissory note or other contract is not performed according to its terms, and the party entitled to demand such performance is compelled to enforce it by law, is just and valid.

Before DEADY, District Judge.

Cyrus Dolph, for the plaintiff.

Thomas N. Strong, for the defendants.

DEADY, J. On September 1, 1877, the defendant, Moreno, with four others as his sureties, executed and delivered a bond to the plaintiff in the penal sum of one thousand dollars, conditioned for the payment of all indebtedness on the part of Moreno to the plaintiff; and on November 23, 1877, said Moreno, with two others as his sureties, executed and delivered another bond of like amount and condition to the plaintiff.

These actions are brought upon these two bonds to recover an amount alleged to be due from said Moreno for goods, wares, and merchandise sold and delivered to him by the plaintiff, and it is agreed that the amount due the plaintiff on such account is on promissory notes seven hundred and forty-one dollars and seventy-four cents, and upon

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an open account six hundred and twenty-nine dollars and seventy cents, in all the sum of one thousand three hundred and seventy-one dollars and forty-four cents. Each bond contains a stipulation to the effect, that in case suit is brought upon the same, the obligors therein will pay, in addition to the penalty thereof, the sum of one hundred dollars "for attorney's fees." The plaintiff now moves for judgment upon the complaint for the amount admitted to be due, and for a hundred dollars in each action as an attorney's fee therein.

This latter part of the motion the defendant resists upon the ground that the provision in the bond for the payment of such fee, in addition to the penalty thereof, is void.

It appears from the books that the question raised upon this motion is comparatively a new and vexed one. It has mostly arisen in actions upon promissory notes containing a stipulation for the payment of a fixed sum or percentage as an attorney's fee to the plaintiff, in case an action is brought to collect the same. And the objection to the stipulation usually is, that the amount which may be collected upon the note being thereby rendered uncertain, it is non-negotiable and not valid as against an indorser, or that such stipulation makes it usurious, and therefore void in whole or part.

But in some few instances the courts have gone farther, and held that such a stipulation is absolutely void, as contrary to the policy of the law, and tending to the oppression of the debtor.

In *Bullock v. Taylor*, 7 Cent. L. J. 217, decided by the supreme court of Michigan in 1878, a stipulation in a note for the payment of a certain sum as an attorney's fee over and above all taxable costs, in case the same was sued upon, was held void as opposed to the policy of the law upon the subject of attorneys' fees, and susceptible of being made the instrument of oppression. In *Woods v. North*, 84 Pa. St. 409, it was held that a similar stipulation in a note rendered the instrument non-negotiable, and thereby relieved the indorser from liability thereon.

In *Witherspoon v. Musselman*, 8 Cent. L. J. 24, decided

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by the Kentucky court of appeals in 1878, according to the brief abstract in the C. L. J., *supra*, it was held that such a stipulation in a note was void, because it tended to the oppression of the debtor and the encouragement of litigation.

On the contrary, in *Smith v. Silvers*, 32 Ind. 321, it was held, that a stipulation "whereby the debtor agrees to be liable for reasonable attorneys' fees, in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it."

In *Wyant v. Pottorf*, 37 Ind. 512, a stipulation in a note for a reasonable attorney's fee was impliedly sustained, though it was held that there must be proof of what is a reasonable fee.

In *Nickerson v. Sheldon*, 33 Ill. 372, it was held, that a stipulation for any attorney's fee did not affect the negotiability of the note, but the fee was not claimed in the action.

In *Clawson v. Munson et al.*, 55 Ill. 394, a stipulation in a mortgage to secure a note for an attorney's fee to be paid as part of the costs of collection, was held valid—the court citing *Dunn v. Rogers*, 43 Id. 260, in which a similar stipulation in a mortgage was enforced—and upon the question of hardship said, that the defendants had expressly provided in the mortgage for the consequences in default of payment, which they might have avoided "by paying the notes at maturity."

In *Gar v. Louisville Banking Co.*, 11 Bush, 189, it was held, that a stipulation in a note for an attorney's fee was not usurious, but an agreement to pay a penalty in default of prompt payment of the notes, and valid.

In *Howenstein v. Barnes*, 9 Cent. L. J. 48, decided by the United States circuit court for the district of Kansas in 1879, it was held that a stipulation for an attorney's fee is valid—that it did not affect the negotiability of the paper.

The ruling that such a stipulation makes the amount payable upon the note uncertain, and it is therefore non-negotiable, is extremely technical, and I think unsound. The

principal and interest is the sum due upon the note at maturity, and by the payment thereof, it will be fully satisfied. And it is only in case of default in such payment, and after the note is overdue, and has therefore lost its character of negotiability, that the penalty or attorney's fee can be claimed or collected at all. In fact, the stipulation, although considered in the note, is, strictly and properly speaking, no part of it, but a distinct contract, collateral thereto, as much as if it was written on a separate piece of paper.

The ruling that such stipulation makes the note usurious is founded upon the unauthorized assumption of fact, that the sum agreed to be paid as an attorney's fee in case the note is not paid at maturity is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the real nature of the transaction it should be treated accordingly. But the fact can not be assumed any more than that a like sum of the alleged principal is illegal interest in disguise.

Accordingly, the tendency of the decisions hostile to this stipulation is to leave these untenable grounds, and hold it void upon the ground that it is a convenient device for usury, and tends to the oppression of the debtor. And it may be admitted that this suggestion is not without force, particularly in cases where the amount provided is largely in excess of what such collection could ordinarily be made for. But a court assumes to make the law, rather than declare it, when it pronounces such a contract void, not because it is prohibited or intrinsically wrong, but because it may be used as a cover for usury and a means of oppressing the debtor.

An agreement by a debtor to pay a reasonable attorney's fee in case his creditor is compelled to incur the expense of an action to collect the debt is only an agreement to so far reimburse the creditor the loss which he may sustain by reason of the debtor's failure to perform his contract to pay his debt. In justice and fairness it stands on as high ground as the right to recover damages for the non-performance of any contract—such as to deliver grain or goods at a certain time and place.

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If A loans B one thousand dollars for the period of one year, for the sum of one hundred dollars, and by reason of the failure of A to perform his contract, B is put to the expense of paying an attorney fifty dollars to collect the same by action, no reason can be given why A should not make good this loss; and if so, why may he not agree to do so in advance? As it is, the law compels A to repay the fees which B is required to pay the officers of the court in the prosecution of his action, including a nominal attorney's fee of not more than twenty dollars. (Secs. 824, 983, of the R. S.)

The provision in section 824, *supra*, allowing the prevailing party to tax an attorney's fee of from five dollars to twenty dollars, is not, in my judgment, exclusive, but only applies in cases where the contract of the parties is silent on the subject. In such cases the law allows the fee prescribed, and no more. But this does not prohibit the parties from contracting that a greater or less one shall be paid. A statute which simply provides that a plaintiff may recover interest on money overdue at a certain rate, does not preclude parties from agreeing that a different rate may be recovered under like circumstances. And if the borrower and lender, in the absence of any statute to the contrary, may agree upon any rate of interest for the use or detention of the loan, it is not apparent why they may not agree upon the payment of an attorney's fee, in case the latter is required to collect the same by law.

But where the fee is so large as to suggest that it is a mere device to secure illegal interest, or some unconscionable advantage, the court should be slow to enforce the payment of it, and ought probably, upon slight additional evidence to that effect, to refuse to allow it, or reduce it to a reasonable sum. Borrowers and lenders seldom deal on equal terms, and the necessities of the former often constrain them to accede to terms and conditions which are oppressive, in the vain hope that they will be able to meet their engagements promptly, and thereby avoid the payment of the charges and penalties stipulated for in case of failure.

It would, then, be better if these stipulations were not

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made for a fixed sum or percentage, but rather for such sums as the court, under all the circumstances, might judge reasonable and right. In this way, regard might be had to the nature and value of the services actually rendered by the attorney. Where the judgment is obtained without opposition on the part of the debtor, as is often the case, the fee should be less than where it is obtained against such opposition.

But, after all, the right of the parties, in the absence of any statute to the contrary, to contract for the payment of a reasonable attorney's fee by the debtor, in case his creditor is put to the expense of collecting his debt by law, rests upon the same ground as the right to make any other contract not prohibited by law, or *contra bonos mores*.

Assuming, then, what has not been questioned, and upon which I express no opinion, that one hundred dollars is no more than a reasonable fee in each of these cases, the stipulation is both just and valid, and therefore ought to be enforced.

There must be judgment accordingly.

WILLIAM RICKARDS ET UX. v. WILLIAM S. LADD,
IN PLACE OF J. G. RICHARDSON.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 21, 1879.

1. AMENDED RETURN.—In the absence of legislation to the contrary, a court has the discretion to permit an officer to amend a return with or without notice, and at any time after the date thereof, so as to bind the parties to the action or those claiming under them as privies.
2. SAME—THIRD PERSONS.—But a court can not authorize a return to be amended so as to affect the rights of third persons acquired in good faith prior to such amendment.
3. SAME—WHEN CONCLUSIVE.—An amended return, as between the parties to the action, or their privies, whether made with or without notice, can not be questioned by them collaterally.

Before DEADY, District Judge.

W. Scott Bebee, for the plaintiff.

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John W. Whalley, for the defendant.

DEADY, J. This action is brought by the plaintiffs, as citizens of California, against the defendant, as a citizen of Oregon, to recover the possession of lot No. 10 in block B in the city of Portland.

By the stipulation of the parties the cause is tried without a jury, and the following facts are considered proved: That in 1867 the plaintiffs mortgaged the premises in controversy to Ann Carney, to secure the sum of one thousand dollars, then loaned by her to the plaintiff, William Rickards; that on November 14, 1868, said Ann, and Edward Carney, her husband, obtained a decree in the state circuit court for the county of Multnomah, to enforce the lien of said mortgage by the sale of the premises, upon which decree the same were sold to said Edward on December 24, 1868, and on August 14, 1869, duly conveyed to him by the sheriff making such sale, and that the defendant has become the owner of all the interest in the premises so conveyed to said Edward.

The decree in *Carney v. Rickards* was given for want of an answer—neither of the defendants appearing in the suit. From the return of the deputy sheriff who served the summons, it appears that the wife was served personally and the husband constructively, by a copy of the summons and complaint being delivered to her for him; but it does not appear that the husband could not be found in the county, or that any effort was made to serve him personally.

After the commencement of this action—July 30, 1879—said deputy applied to the circuit court aforesaid for leave to amend his said return so as to state therein that “he made due and diligent search for said defendant, William Rickards, in order to serve him in person, but was unable to find him within the county,” which application was allowed by said court, and the return amended accordingly.

No notice of this application was given to the plaintiffs herein, and so far as appears, no evidence or circumstance was offered or used in support thereof except the affidavit of the deputy that he verily believed he had made such

search for the husband before leaving the copies of the process with the wife for him.

Upon the authority of *Settlemer v. Sullivan*, 93 U. S. 444, it is admitted that the service, as shown by the original return, was not sufficient to give the court jurisdiction, because it does not appear therefrom that any effort was made to serve the husband personally before attempting to make a substituted service upon his wife. But it is claimed that the amended return shows a good service, and therefore the court had jurisdiction to order the sale of the premises. To this the plaintiffs reply, that the amended return, being made without notice to them of the application therefor, is invalid; and also that even such return is insufficient, because it does not show that the person upon whom the substituted service was made was "of the family" of said Rickards, as required by statute (Or. Civ. Code, sec. 54), nor that a copy of the complaint as well as the summons was served upon the wife. In actions at law the statute (sec. 54, *supra*) makes it necessary to serve a copy of the complaint with the copy of the summons upon each defendant; but in suits in equity, where there is more than one defendant it is sufficient to serve a copy of the complaint upon only one of them, as was done in this case. (Or. Civ. Code, sec. 386.)

It is true that the amended return does not show that Mary Ann Rickards, upon whom the substituted service was made, was of the family of the defendant; but it does state that she was his "wife."

The proof of service of process upon which a court takes jurisdiction to give judgment against a party that may result in depriving him of his property, ought to be distinct and certain. Every essential of the statute ought to appear to have been substantially complied with. Particularly is this the case where a personal judgment is sought to be obtained upon a constructive service. (*Hewitt v. Weatherby*, 57 Mo. 280.) It is not enough that it appears from the return of the officer that the service may have been duly made. Each essential fact of the service must be stated explicitly, or in such terms as make it appear by necessary

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implication or inference. (*Settlemeir v. Sullivan, supra*, 449.)

Now, a person who is the wife of a defendant is not, therefore, on any given day or hour a member of his family within the meaning of the statute; that is, it does not necessarily follow from that fact that she is then living or being "at the dwelling-house or usual place of abode" of the defendant, within the county. In this age of locomotion and self-direction, husbands and wives do not always live under the same roof, and are often temporarily separated. (*Hewitt v. Weatherby, supra*, 279.)

But when it also appears, as it does in this case, that the wife, at the time of the substituted service, was at "the usual place of abode" of the husband, I think the necessary inference is, that she was a member of the family therein, within the meaning of the statute, and a substituted service might be lawfully made upon her there.

The only other question in the case is, whether the court had power to permit the deputy to amend the return without notice to the parties interested; and upon an examination of the authorities, and a careful consideration of the nature and reason of the proceeding, I think it had.

And, first, this is not a jurisdictional matter. The jurisdiction of the court depends upon the service of the process. The proof of the fact, the return, is made by the officer making the service, in obedience to the command of the writ under such regulations as the law may prescribe. The court can not say what return shall be made, but when made, it becomes a part of the record of the court. The defendant is not a party to the proceeding, and it is made without his consent or notice to him.

If afterwards it is discovered that a mistake has been made in the matter, the return, being now a record of the court, can only be amended by leave of the court. But still the court does not make the amendment. The authority to amend the return, as in the case of making it, is primarily in the officer, and not in the court; but after making the return, the authority of the officer becomes qualified so that it can not be exercised without the consent of the court.

Strictly speaking, then, the proceeding is one between the officer and the court. It is *ex parte* in its very nature, and no one has an absolute right to notice of it. In contemplation of law the amended return is made under the same sanction and responsibility as the mistaken one. In effect, it becomes the return in the case, and can not be questioned collaterally by the parties to the action or those claiming under them as privies. (Freeman on Ex., sec. 365.)

In support of the proposition, that notice to the parties interested is necessary in case of an application to amend a return, the plaintiff cites *O'Conner v. Wilson*, 57 Ill. 226. But this was a suit in equity, a direct proceeding to set aside an amended return as being fraudulently made and operating as a cloud upon the plaintiff's title. The amended return was made by the sheriff twelve years after the date of the return, and when he had become interested in maintaining the title to certain premises under a sale made in a suit in which this amended return was made, while the service was made by his deceased deputy, and there was no memorandum of the transaction or knowledge thereof upon his part, by which the amendment could be honestly and intelligently made. The case is an interesting one, and contains some wholesome limitations upon the power of amending returns. The court set aside the return as being made by the principal, and not the deputy who made the service, and because he was disqualified to do so by interest; and also, that after the lapse of twelve years, leave should not be granted to amend a return. The court also laid down the rule, that a court should not grant leave to amend a return, without notice to the party thereby affected, after the term at which the cause is determined. But this was confessedly a new rule, and so far modified the prior cases, in that court, of *Turney v. Organ*, 16 Ill. 43; *Dunn v. Rodgers*, 43 Id. 260; *Moore v. Purple*, 3 Gilm. 149, and *Moores v. The Trustees etc.*, 15 Ill. 266.

The same ruling, in effect, was made in *Thatcher v. Miller*, 13 Mass. 271. In this case the officer asked to amend his return after a period of six years. The court refused the application, and said: "More than six years have elapsed

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since the return was made; and the deputy sheriff now offers to insert an essential fact, the omission of which may render him liable to an action for damages. It would be unsafe to expose officers to so much temptation. At the same term at which a precept is returnable, to correct a mistake or omission may be highly proper; but for an officer to undertake, six years after a defective return, to know with certainty the performance of a particular duty, when he is daily and hourly performing similar duties upon different persons, is more than can be expected of men, however strong their memory." To the same effect is *Hovey v. Wait*, 18 Pick. 197, in which the court refused, after a lapse of seven years, to permit an officer to amend his return so as to change the date of an attachment from the seventeenth to the fifteenth of the month, and thereby give it priority over a conveyance of the same premises.

But it must be borne in mind that this is a case between the parties to the suit in which the return was amended. No rights have been acquired or changed in the mean time upon the faith of the original return. Therefore the amended return, so far as this action is concerned, is only to have effect between the parties to the suit in which it was made. But as was held in this court on the motion for a new trial in *Mickey v. Stratton*, 5 Saw. 475, an amendment to a return can not in any way affect the rights of persons not parties to the suit, which were acquired in good faith before the amendment was made.

In *Emerson v. Upton*, 9 Pick. 168, it was held that a mortgage made before an attachment was levied upon the same premises, as appeared from the return, should prevail over said attachment even after the return was amended, so as to show that the attachment was in fact served prior to the record of the mortgage. (See also *Newhall v. Provost*, 6 Cal. 87; *Webster v. Howorth*, 8 Id. 25; *Freeman on Ex.*, sec. 365.)

But an amended return is binding upon a third person who had notice of the actual service of the process or the facts contained in the amended return before acquiring any right in the property affected thereby. (*Haven v. Snow*, 14 Pick. 28; *Johnson v. Day*, 17 Id. 108.)

Although the courts very generally say that an officer ought not to be allowed to amend his return, at least after the time at which it is returnable, without notice to the persons to be affected by it, yet no case has been found in which an amended return has been held invalid for want of notice, when questioned collaterally. In *Kitchen v. Reinsky*, 42 Mo. 436, a return was amended, without notice, after a lapse of six years. The court upheld it and said: "The discretion of the circuit court as to the matters of this kind is very large under the laws of this state. Although an amendment of the process should be allowed after judgment, and without notice, still it will not be questioned in the absence of anything to show an improper exercise of that discretion."

In *Gavit v. Doud*, 23 Cal. 81, an amendment was sustained by which the sheriff included in his return upon an attachment and execution the very property he was then sued for taking and disposing of unlawfully. It does not appear whether the amendments were made upon notice or not, and the court, as in the case of *Kitchen v. Reinsky*, *supra*, seems to have attached some importance to the fact, that it appeared the court had acted justly in allowing them.

In *Barker v. Binninger*, 14 N. Y. 277, a deputy sheriff had returned an execution *nulla bona*. The sheriff was afterwards allowed to cancel this return, and return that the writ was levied upon a horse of the defendant in the execution. Between the levy and the first return, Binninger, a stranger to the process, took the horse, and the sheriff sued him for conversion. The court upheld the amendment, although made without notice, upon the ground that Binninger was not a party to the execution; did not act upon the return; was a trespasser, and had no right in the matter which was affected by the amendment, and, therefore, no notice to him was necessary. (See also *Linthicum v. Remington*, 5 Cr. C. C. 546; *Supervisors v. Durant*, 9 Wall. 736.)

But the general rule seems to be, that the court has the discretion to allow a return to be amended in all cases, with or without notice, but that such amended return can not

affect the right of third persons acquired in good faith prior thereto; and whenever an amendment is so made, it can not be questioned collaterally by the parties to the suit or those claiming under them as privies.

At the same time it must be admitted that this discretion is liable to great abuse, which may work irremediable injury to parties. It is easy to say that a person whose rights are injuriously affected by an amended return has a remedy against the officer for a false return. But in most cases, where an amendment is allowed after a lapse of time, even much less than in this case, the strong probability is, that the officer is insolvent, and his sureties in the same condition or released. For it can hardly be that the sureties are liable for a false return of their principal, made long after his term of office has expired.

As was well said by the court, in *O'Conner v. Wilson, supra*, "to permit such amendments, as a matter of course, without notice, and by any person who may have been in office at the time, and who may subsequently have become insolvent, and whose sureties may be in like condition, or who by lapse of time have become released, would be calculated to work great wrong and injustice."

The matter ought to be regulated by the legislature, so that, at least, no return could be amended after judgment in the case, without notice to the parties to be affected by it, nor after one year without substantial corroboration of the statement of the officer.

But as the law is, or appears to be, this amendment, as between the parties to the suit, although made without notice after a lapse of nearly eleven years, and upon the uncorroborated statement of the deputy, about a common and usual occurrence, can not be questioned collaterally in this court, and is, therefore, so far valid.

There must be a finding for the defendant, that he is the owner of the premises.

CRAGIE SHARP v. JAMES B. STEPHENS ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 25, 1879.

PATENT, CONTRADICTION OF.—In an action at law, a patent to a married settler, under the donation act of Oregon, and his wife, India, can not be contradicted and avoided by showing that the true wife of such settler was another person named Angeline.

Before DEADY, District Judge.

IV. Scott Bebee, for the plaintiff.

Joseph N. Dolph, for the defendant.

DEADY, J. The plaintiff, a citizen of California, and claiming to be the successor in interest of India Stephens, the alleged wife of Edward S. Sexton, brings this action against the defendants, citizens of Oregon, to recover the possession of a half section of land, situate in Washington county, the same being the wife's half of the donation of said Sexton.

The answer contains a detailed statement of the facts of the case. To this there is a demurrer by the plaintiff, and a stipulation by the parties, to the effect that the only question to be determined on the demurrer is, do the facts constitute a legal defense to the action?

The answer states substantially, that in January, 1843, said Edward S. Sexton was lawfully married to his wife Angeline, in the state of Illinois, who remained his lawful wife until his death; that prior to September 27, 1850, said Sexton left said Angeline in said Illinois, where she has ever since resided, and came to Oregon, where, on March 20, 1850, he unlawfully married India Stephens, with whom he lived and cohabited until his death; that on September 1, 1853, said Sexton settled upon six hundred and forty acres of land, including the premises in controversy, as a married man, under section 4 of the donation act of September 27, 1850, and resided upon and cultivated the same for more than four consecutive years thereafter; that after-

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wards, on June 31, 1868, in pursuance of the premises, a patent certificate was issued by the proper officers of the local land office for said donation to said Sexton and his wife, the said Sexton then and there fraudulently pretending to said officers that said India was his wife, and thereby procured her name to be inserted therein as the name of his wife; that on May 5, 1873, a patent was issued by the United States for said donation to said Sexton and wife, the south half thereof to the former, and the north half to the latter, and by reason of the error in said patent certificate as to the name of the wife of said Sexton, the name of said India was wrongfully inserted in said patent as the name of the wife of said Sexton; that after the issue of said patent certificate, said Sexton died intestate, leaving said Angeline and her two children and one grandchild as his only heirs at law; that the defendant, James B. Stephens, is now, and for more than six years has been, the owner of the interest of said Angeline and children in the premises, and entitled to the possession thereof, and the defendant Dittenthaler is in possession of said premises by permission of said Stephens, and that whatever interest the plaintiff has in said premises is derived from said India, and not otherwise.

The defendant maintains: 1. That a settler under the donation act, takes a grant under and by virtue thereof from the date of his settlement, and that therefore the patent is only a record of the previously existing rights of the donee; 2. That one half of the donation of a married settler inures, by operation of the act, to his wife; and, 3. That a patent issued without authority of law is void, and can not affect pre-existing rights; and from these premises seeks to establish the conclusion that this patent, so far as it states and records that the one half of Sexton's donation inured to India rather than Angeline, is false and void.

The propositions contained in this argument are undoubtedly sound, and have repeatedly received the sanction of this and the supreme court. But I do not think they authorize the deduction sought to be made from them.

It is not claimed that this patent is in this or any partic-

ular void because issued contrary to law, or on account of any fraud or mistake which appears upon its face. Now, it is an elementary principle that a patent can not be avoided for matter *dehors* the record, except by a suit in equity, in which the fraud or mistake is directly pleaded. (*Mounsey v. Drake*, 10 Johns. 25; *Polk's Lessee v. Wendal*, 9 Cr. 98; *Doe v. Wenn*, 11 Wheat. 381; *U. S. v. Stone*, 2 Wall. 535; *French v. Fyan*, 93 U. S. 169; *Moore v. Robbins*, 96 Id. 530.)

Who was the wife of the settler, Sexton, is a question of fact, and there is nothing upon the face of the patent which indicates that a mistake was made in its determination by the officers of the land office. To admit evidence in this action to show that Angeline and not India was such wife is to contradict the patent upon such point, and to show a mistake therein by matter outside of itself, which we have seen can not be done in an action at law.

Sexton was required to make proof in the land office of the facts which entitled him to this donation to himself and wife, one of which was that he was a married man. Strictly speaking, it may be, that such fact could be established without proving who the wife was—without naming her. And the only ground upon which the right to make this defense can be put, is that the finding and allegation in the patent, that the wife of Sexton was India, was unnecessary, and may therefore be disregarded as surplusage. But the question of marriage naturally, if not necessarily, includes the inquiry, who are the parties to it? The land office found that Sexton was a married man because he was the husband, not of Angeline, but of India; and although this latter conclusion appears now to have been an error caused by the false and fraudulent representations of Sexton, yet it can not be corrected in this action without violating the salutary rule which precludes a patent from being avoided in an action at law for matters not apparent upon its face. The case of *French v. Fyan*, *supra*, 169, is like this in principle, and very similar to it in fact. A grant of swamp land was made to the state of Missouri. The statute also made it the duty of the secretary of the interior to select the lands, and cause patents to be issued to the state there-

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for. A party claiming under one of these patents being sued by one claiming under a railway grant for the same premises, gave the patent in evidence. The plaintiff then offered to prove by parol that the land described in the patent was not in fact swamp or overflowed, but the offer was refused. The supreme court sustained the ruling. Mr. Justice Miller, who delivered the opinion of the court, quoting the opinion in *Johnson v. Towsley*, 13 Wall. 72, said: "That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principles above stated; and in all courts, and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights; and by virtue of this power the final judgment of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown or other executive branch of the government have been corrected or declared void, or other relief granted;" and although this was a case in which the patent was only the record of a pre-existing grant, the learned justice said it was within "the operation of that rule," and that the court was "of opinion that, in this action at law, it would be a departure from sound principle and contrary to well-considered judgments in this court, and others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of the jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a

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title for lands which it purported to convey." In my judgment, this case furnishes the rule of decision for the one under consideration. The facts set up in the answer being contradictory of the patent upon the point in controversy, can not be given in evidence in this action at law, and, therefore, whatever may be their effect in equity, they do not constitute a legal defense thereto.

There must be a finding for the plaintiff.

OREGON AND WASHINGTON TRUST INVESTMENT CO.
v. C. W. SHAW ET UX. AND CHARLES SWEGLE.

CIRCUIT COURT, DISTRICT OF OREGON.

SEPTEMBER 1, 1879.

MERGER.—The former ruling in this case affirmed on rehearing. (See 5 Saw. 336.)

Before DEADY, District Judge.

Ellis G. Hughes, for the complainant.

W. H. Holmes and Claude Thayer, for the defendant, Swegle.

DEADY, J. After hearing this cause on bill and the answer of the defendant Swegle, the court decided that the lien of Swegle's mortgage was never merged in the fee, and was prior to that of the complainants.

Upon the petition of the complainant a rehearing was granted. After a careful study of the learned and voluminous brief of counsel for complainant, my conclusion is, that:

1. There never was any merger of the mortgage and fee in Shaw, because the two interests never were united in him, Shaw having transferred the Adams mortgage to Swegle some weeks before he received the conveyance of the fee from the former.

2. The transfer of the mortgage to Swegle by Shaw was valid as against Shaw, even if it was necessary to record it as against a subsequent *bona fide* purchaser of the same

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property, and therefore the mortgage remained the property of Swegle and could not be merged in the fee afterwards acquired by Shaw from Adams.

3. Even if the mortgage and fee had been united in Shaw, there was no merger, because Shaw, having transferred the former to Swegle, thereby plainly manifested his intent to keep the mortgage and fee separate, and therefore the mortgage to the complainant was at most only a conveyance or pledge of the premises, subject to the lien of the prior mortgage before then transferred to Swegle.

4. The statute of this state does not require a transfer or assignment of a mortgage to be recorded, particularly when such transfer occurs by operation of law, upon the indorsement or delivery of a promissory note for the payment of which it is only a security.

5. If the statute did require the transfer or assignment of a mortgage to be made after the manner of a conveyance, and recorded, still the failure to record such assignment would not render it void as against the complainant, because it is not a purchaser of the same property—the mortgage from Adams to Shaw—but only of the fee, subject to said mortgage, or rather of a mortgage thereon subsequent to said mortgage.

6. The complainant having taken a mortgage with notice upon the record that there was a prior unsatisfied mortgage upon the same property, to secure the payment of a negotiable note, not then due, has no right to complain if the lien of said mortgage is now preferred to its lien. Upon the record it took a second mortgage without inquiry as to the ownership or condition of the first one, and if it did so upon an impression that the prior mortgage was merged in the estate of its mortgagor, it acted, as appears, upon insufficient reasons, and must bear the consequences of its own mistake.

ROBERT ALEXANDER v. SAMUEL B. KNOX, IN PLACE
OF GEORGE T. SEARS.

CIRCUIT COURT, DISTRICT OF OREGON.

SEPTEMBER 3, 1879.

1. COUNTY.—A county in Oregon is a body politic, and may, in the exercise of the powers given it by statute, take a note or bond and mortgage, and enforce the same by the ordinary legal proceedings in the courts.
2. SCHOOL FUNDS.—In 1858, the only fund which a county treasurer was authorized by law to loan was the common school fund in his custody, arising from the sale of sections 16 and 36, and in doing this he was the agent of the territory—the trustee of the fund—and not the county, and a suit to enforce the obligation of such note and mortgage should have been brought in the name of such treasurer.
3. PLAINTIFF.—A suit brought in the name of a plaintiff who is neither a natural nor an artificial person is a nullity, and therefore a suit by the “board of county commissioners of Lane county,” in 1863, to enforce a note and mortgage given to the treasurer of that county upon a loan of school funds was a nullity, and could not support a decree for any relief.
4. JUDGMENT.—The judgment of a court of general jurisdiction is presumed to have been rightly given, upon sufficient pleadings and process, until the contrary appears; and therefore, where it appears that a decree might have been given, either in a suit which was a nullity for want of a real plaintiff, or in another which was not, this presumption is sufficient to sustain the validity of the same.
5. JUDGMENT ROLL.—The certificate of the clerk is not evidence of the character or legal effect of the paper to which it is appended—as, for instance, that it is a copy of judgment roll, but only that it is a true copy of the original, on file in his office, and as to what it is, it must speak for itself.
6. CLAIM—DONATION.—The boundaries of a claim, under the donation act, are a part of the public surveys of the country, and a description of a tract of land as a claim, number 70, in township 20 south, of range 3 west, is sufficiently certain in a decree, or elsewhere.
7. DONATION—WIFE'S SHARE.—Where a claim was taken up by a married settler, under section 5 of the donation act, after January 20, 1852, and the wife died before January 30, 1854, and before the completion of the residence and cultivation required by the act, her share of the donation was, by virtue of the act of January 20, 1852 (Ses. L., 64), her separate property, and upon her death descended to her heirs unaffected by any claim of the husband on account of the marriage, as directed by the common law.

Before DEADY, District Judge.

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THIS action is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to recover the possession of a half section of land situate in Lane county, the same being the donation claim of Robert Alexander, and Sarah, his wife, numbered 70, and lying in sections 35 and 36, in township 20 south, of range 3 west, of the Wallamet meridian.

The action was commenced against the tenant, George T. Sears, when, on his application, the landlord, Samuel B. Knox, was made defendant in his place. In the pleadings, each party alleges that he is the owner of the premises, and the other is not.

The case was heard by the court without a jury.

Addison C. Gibbs and W. Scott Bebee, for the plaintiff.

Rufus Mallory and Horace Knox, for the defendant.

DEADY, J. From the evidence it appears that the plaintiff went on the premises on September 1, 1852, as a married settler, under section 5 of the donation act, and resided upon and cultivated the same for four years, as required by said act; and that his wife, Sarah, died thereon in 1853; that on September 27, 1867, the officers of the proper land office issued a patent certificate to said plaintiff and wife for said premises—the north half to the husband and the south one to the wife—and that on June 14, 1877, a patent for the premises issued in pursuance of said certificate; that on November 17, 1858, said plaintiff made his promissory note to the treasurer of Lane county for the sum of eight hundred dollars, payable three years from date, with interest at the rate of ten per centum per annum, and to secure the payment of the same, together with his then wife Susannah, on the date last aforesaid, executed and delivered to said treasurer a mortgage of said premises; that on October 8, 1863, a suit was commenced against said plaintiff and wife in the circuit court for said county to enforce the lien of said mortgage by filing a complaint therein, in the name of the “board of county commissioners of Lane county,” and on the same day a summons likewise entitled was placed

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in the hands of the proper officer, who, on October 16, 1863, returned thereon that he had duly served the same on said plaintiff on October 9; that on October 30, 1863, for want of an answer, a decree was given in said court entitled *Lane County, plaintiff, v. Robert Alexander, defendant*, directing the sale of said mortgaged premises, and that the proceeds be applied to the payment of the costs and expenses of the suit and one thousand seventy-nine dollars and fifty cents paid to the complainant, with interest from date; that on September 1, 1866, in pursuance of said decree, said premises were duly sold to one J. W. Matlock for the sum of one thousand two hundred dollars, and on October 25, 1866, said sale was duly confirmed; that on July 27, 1867, in pursuance of said sale and confirmation, said premises were by the sheriff duly conveyed to said Matlock, who afterwards, on June 22, 1867, in consideration of the sum of one thousand and fifty dollars, conveyed to the defendant, Samuel B. Knox, all the interest of the plaintiff therein on September 1, 1866, and that afterwards, on March 20, 1867, said defendant, Knox, by means of proper conveyances, acquired all the interest in the premises of the six children and heirs to plaintiff's deceased wife, Sarah.

The plaintiff puts his right to recover upon the ground that the decree upon which the premises were sold to Matlock is void, because: 1. The county of Lane had no power or authority to loan money or to take or own a mortgage; 2. The decree was given in a suit in which "Lane county" was the plaintiff, while it appears from the records that the only suit then pending upon said note and mortgage in said court for Lane county, was one in which the "board of county commissioners of Lane county" was plaintiff. Before considering those questions, it may be well to state the right of the plaintiff in the premises at the date of this mortgage, a point upon which there was some conflict and uncertainty in the opinion of the counsel.

The donation act made no provision for the descent or disposition of the wife's share of the donation in case of her death before the completion of the residence and culti-

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vation required by the act. At the death of Sarah, 1853, she was seised of an estate of inheritance—a conditional fee in her share of the donation—the condition being, that her husband should complete the necessary residence and cultivation thereon. There being then no statute in force in Oregon regulating descent of real property, the subject was regulated by the rules of the common law. According to these, the property descended to her children, as her heirs, to the exclusion of her husband. Neither did the latter acquire a life estate in the premises as tenant thereof by the curtesy. For by the act of January 20, 1852 (Ses. L., p. 64), it was provided that “all right and interest of the wife” in the donation “be and is hereby secured to the sole and separate use and control of the wife.” The share of the wife, Sarah, in this donation, was acquired after the passage of this act, and by the necessary operation of it the husband was precluded from taking any interest in it by virtue of the marriage. And although this act was repealed on January 30, 1854, and section 30 of the act of January 16, 1854, in relation to estates (Or. Laws, p. 588), gave the husband an estate for life in the inheritance of the wife, of which they were both seised in her right, “as tenant thereof by the curtesy,” whether they had “issue born alive or not,” still in this case, the wife having died before such repeal and enactment, and her inheritance having in the mean time descended to her children without any interest therein on the part of her husband, their rights could not be affected thereby. (*Fields v. Squires*, 1 Deady, 377, 382; *Wythe v. Smith*, 4 Saw. 21.)

It follows from these premises, that the plaintiff never had any interest in the wife's donation, and is, therefore, not entitled to the possession of the same, and that the defendant having acquired the interest of her heirs therein, is the owner of the same, independent of the sheriff's deed.

As to the remaining quarter section, the husband's share of the donation, the case will now be considered upon the plaintiff's objections to the validity of the decree. By the laws of this state, each county therein “is a body politic and corporate,” for the purpose, among other things, of

purchasing and owning property, real and personal, for the use thereof, and of making "all necessary contracts," and doing "all other necessary acts in relation to the property and concerns of the county" (Or. Laws, p. 535); and the county court, as the representative of the county, has the power to provide, among other things, for the erection and furnishing of all necessary public buildings, bridges, the maintenance and employment of the poor, the management of the county property, funds, and business, and to compromise for any debt or damages due the county. (Or. Civ. Code, sec. 870.) The county sues, and is sued, in its name under the direction of the county court (Id., sec. 871), and may maintain an action upon a cause of action accruing to it upon a contract made with it. (Id., sec. 346.)

From this summary of the powers of a county, it is apparent that it must have the authority in many instances to take notes and mortgages, and enforce them by the usual and proper legal proceedings. To show this, it is only necessary to suggest a few cases. For instance, the county may let a contract to construct a building or bridge, and may therefore take a note or bond and mortgage as security for the due performance thereof; it may compound a debt due the county by the sureties of a defaulting officer, and may, of course, take a note and mortgage for the sum accepted in lieu of the whole debt; it may also accumulate a fund by a limited tax, during a period of years, wherewith to construct an expensive bridge or building, and may in the mean time loan the fund as it is collected upon the note and mortgage. These acts are necessarily incidental to the powers expressly granted to the county. Indeed, the last instance is probably included in the express power to manage and care for "the county property, funds, and business."

From the complaint in the case of *The Board of Commissioners v. Alexander*, it appears that the note and mortgage sued on were given to the county treasurer. By section 20 of the act of August 14, 1848 (9 Stat. 323), it was provided that sections 16 and 36 of the public lands of the territory should be "reserved for the purpose of being applied to

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schools" therein. By the act of January 7, 1856 (Ses. Laws, p. 69), it was provided that the school lands in the various counties should be disposed of by the county superintendents of schools, and the proceeds deposited with the territorial treasurer; and by the act of January 30, 1858 (Id. 43), that said proceeds should be paid into the county treasury, and it was also thereby made the duty of the respective county treasurers to loan the same under certain regulations therein prescribed, upon note and mortgage, for a period not exceeding three years.

The only money which a county treasurer was authorized by law to loan at the date of this note and mortgage was this school fund, and the reasonable inference is that such was the character of the money loaned to Alexander. These funds belonged to the territory, in trust for the benefit of the common schools of the country, and the fact that the legislature employed the county superintendents to dispose of the lands, and the county treasurers to keep and loan the funds arising therefrom, did not make them the property of the county, or authorize it to bring suit upon a note and mortgage made to the county treasurer therefor. In the absence of any statute to the contrary, the suit upon this Alexander note and mortgage should therefore have been brought in the name of the county treasurer. But the validity of this note and mortgage, and the right of Lane county to sue upon it, was necessarily involved in the decree of the circuit court, and is therefore conclusively determined by it, whenever the question arises collaterally. (*Semple v. Bank of British Columbia*, 5 Saw. 88; *Cromwell v. County of Sac.*, 4 Otto, 352.) In the former case the court said: "The court, even if there had been no defense interposed, must, in giving its decree, have determined that the bank had capacity to sue, and that the note and mortgage were valid. This much at least was necessarily included in the decree, and without determining these two questions in this way, the court could not have pronounced it."

During the territorial government, the county was represented and its business transacted by a board, called "the board of county commissioners;" but by the constitution of

the state government this tribunal was superseded by the county court. At the date, then, of the commencement of the suit against Alexander in the Lane county circuit court, there was no such person, either natural or artificial, as the "board of county commissioners of Lane county," and therefore the suit commenced in its name was without a plaintiff, and a mere nullity. (*Proprietors of the Mexican Mill v. Yellow Jacket S. M. Co.*, 4 Nev. 42.)

Of course, if the decree enforcing the lien of the mortgage, although entitled *Lane County v. Alexander*, was actually given in the suit, entitled *Board of County Commissioners etc. v. Alexander*, then it is null and void also.

The only question, then, open to consideration in the case is, whether the decree was given in such suit or not.

The decree and suit being in favor of different plaintiffs, are not presumed to be a part of the same proceeding, although the subject-matter appears to be the same. For aught that appears, the suit by the board of commissioners may have been dismissed or abandoned as a mistake, and another one brought in the name of the county in which this decree was duly given.

The circuit court of Lane county is a court of general jurisdiction, and therefore the presumption is in favor of the regularity of its proceedings. In such a court all things are presumed to have been rightly done. (*Miller v. U. S.*, 11 Wall. 299.) Therefore, the presumption is that the decree in question was duly given in a sufficient proceeding, and if from the records it appears that such decree might have been given in either a suit by the *Board of Commissioners* or *Lane County v. Alexander*, the presumption is that it was given in the latter, rather than the former, because that would be legal, and the other not.

But the plaintiff contends that it appears affirmatively from the record that this decree was given in the suit of the *Board of Commissioners v. Alexander*. The ground of this claim is that the clerk of the circuit court of Lane county has appended to a copy of the complaint, summons, and return thereon in said case and the decree in *Lane County v. Alexander* an official certificate of the date of April 14, 1879,

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to the effect that he has carefully compared said copies "with the original judgment roll in the suit of *Lane County v. Robert Alexander*," then on file in this office, and that they are correct copies of the whole thereof; and further, that according to the records and files of his office, no other paper than these "was ever filed or made in said suit."

In this certificate, the clerk does impliedly assert that there is in his office a judgment roll constituted by the papers of which these are copies, and the argument from this fact is, that it is conclusive evidence that the decree entitled *Lane County v. Alexander* was really given in the suit of the *Board of Commissioners v. Alexander*, and is therefore void—such suit being a nullity for want of a plaintiff.

But can the clerk certify that there is or is not a judgment roll on file in his office, or that any given number or kind of papers therein constitute such a roll? It is clear in my judgment that he can not. The only fact of which his certificate is evidence, is that the paper to which it is appended is a true copy of the original then on the files or records of his office. Being the custodian of the original, he is authorized to make a copy thereof, and his certificate is proof of that fact. (Or. Civ. Code, secs. 568, 720, 738.) But with this his power ends; and whether the paper is a judgment roll or not, must be determined by itself. If a clerk certifies that a paper is a true copy of an entry in the records of his office, and that the same is a judgment in a particular action, the latter part of such certificate is extra-official, and of no effect. For whether such an entry is in law a judgment in the particular action mentioned or at all, is a question of law to be determined by the court when and where it may arise, and not the clerk.

What constitutes a judgment roll, and when and by whom it shall be made, is set forth with particularity in section 269 of the Or. Civ. Code. It provides that the "clerk shall prepare and file in his office the judgment roll" before the next term of the court after docketing the same.

The power of the clerk to make this roll does not extend beyond the next term, unless perhaps upon an order of the

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court allowing the same to be done thereafter. When the complaint is not answered the roll is made by attaching together the complaint, summons, proof of service, and a copy of the entry of judgment. But such papers do not constitute a judgment roll, unless they have been identified and attached together by the clerk as the complaint, summons, and judgment in a particular case. But this is not all. These papers, when so collated, must be marked as the judgment roll, by being inclosed in a blank sheet of paper, with "the name of the court, the term at which judgment was given, the names of the parties to the action, and the title thereof, for whom judgment was given, and the amount or nature thereof, and the date of its entry and docketing," indorsed thereon; and then the roll being prepared, must be filed by the clerk as such. But the judgment existed before the judgment roll, and is valid without it.

Tried by this statute there is no judgment roll, so far as appears, in either *The Board of Commissioners* or *Lane County v. Alexander*. There are copies of some papers here from both cases, but there is no judgment roll in either of them. Neither is there any sufficient evidence that there never were any other papers on file in either case. The certificate of the clerk is not, and could not be, absolute on that point, but is only according to the present records and files of his office. Further than this the clerk could not certify. But the present absence of a complaint, summons, and proof of service in the suit of *Lane County v. Alexander* from the files of Lane county court is not sufficient evidence that they were never there, in the face of the presumption to the contrary, arising from the fact that there is a final decree in that suit of record. The presumption being that this decree was rightly given, until the contrary appears, it follows that it must have been given upon proper pleadings and process. And the mere fact that the clerk of the court, after the lapse of sixteen years, is unable to find such pleadings or process on file in his office, or any evidence from the records and file thereof, that they ever were there, is not sufficient to neutralize or overcome such presumption.

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Point decided.

Objection was also made to this decree for want of certainty in the description of the premises directed to be sold and the amount to be paid the plaintiff therein. The description of the premises is as follows: "Claim No. 70 in T. 20 S., R. 3 W., of the Wallamet meridian." The survey of a donation claim is a part of the public surveys of the country, and therefore a description of a tract of land, as claim No. 70 in a certain township and range, is just as certain as a description by reference to a certain section in said township and range. The word "claim" in the surveys under the donation act is used to designate a tract of land claimed by a settler under such act—a donation claim. The premises are so described in the patent certificate and patent; and it is equally as certain as one by the section or subdivision thereof.

The decree directs that the premises be sold, and that out of the proceeds the plaintiff therein be paid one thousand and seventy-nine dollars and fifty cents, with interest from date. There is no uncertainty in the decree in this particular.

There must be a finding for the defendant, that he is the owner of the premises.

UNITED STATES v. HALF BARREL CONTAINING
TWENTY-THREE WINE GALLONS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 26, 1879.

DISTILLED SPIRITS—STAMPS.—The use, to contain domestic distilled spirits, of casks, etc., in which foreign distilled spirits, wines, etc., have been imported, is prohibited by section 12 of the act of March 1, 1879, notwithstanding that the stamps required by law have been effaced, obliterated, and destroyed.

Before HOFFMAN, District Judge.

A. P. Van Duser, assistant United States district attorney,
for United States.

IV. W. Morrow, attorney for claimant.

HOFFMAN, J. I have carefully considered the suggestions contained in the ingenious brief filed by the counsel for the claimant, in support of his application for a reconsideration of the decision heretofore rendered by this court. The whole question turns upon the construction to be given to the words in section 12, "casks or other packages such as is hereinbefore mentioned, in which distilled spirits, etc., have been imported." Do they refer to the "pipes, hogsheads, tierces, barrels, casks, or other similar packages" mentioned in section 11, or to "the packages of imported liquors stamped as above required," mentioned in the previous clause of section 12? If the latter be the true construction, the use of imported packages from which the stamps, etc., required by law, have been effaced and obliterated, to contain domestic spirits, is not prohibited.

But this construction seems forced and unnatural. The preceding clause of section 12, in substance, directs that wherever the contents of any package of imported liquors, stamped as required by law, shall be emptied or drawn off, the stamps, brands, etc., placed thereon, shall be effaced, obliterated, and destroyed at the time of such emptying. Then follows the clause under consideration, "and no cask or other package, such as is hereinbefore mentioned, in which distilled spirits, wines, or malt liquors have been imported, shall be used to contain domestic distilled spirits," etc.

It is urged that the words "such as is hereinbefore mentioned" could not have been used to indicate pipes, hogsheads, tierces, etc., mentioned in the eleventh section, because they are superfluous and unnecessary, as the whole meaning would be conveyed by the words "no package in which distilled spirits have been imported." It is therefore argued, that we can only give a meaning to the phrase by construing it as referring to "the packages of imported liquors stamped as above required."

The rule of construction which requires that effect shall be given and a meaning found, if possible, for every word

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or phrase of a statute, is undoubtedly sound and reasonable, but it does not permit us to reject an obvious and natural construction, merely on the ground that it renders some words or phrases superfluous and redundant. Such expressions almost invariably occur in statutes, and in other legal documents, and the act under consideration affords a conspicuous example of their use. The enumeration of "pipes, hogsheads, tierces, barrels, casks, or other similar packages," in the eleventh section, seems quite unnecessary. The words "any package" would have sufficed. So, too, the requirement, that the stamps shall be "effaced, obliterated, and destroyed," when the contents of the cask are "emptied" or drawn off, and the language in the thirteenth section in reference to packages "made in imitation of, or intended to be in the similitude of," etc., afford instances of pleonasms which would not be admitted in ordinary writing.

But even if the argument derived from the use of redundancies had more force, it would in this case be deprived of it, for the construction contended for is obnoxious to the same objection as that urged against the construction which is attacked. If the words "cask or package, such as is hereinbefore mentioned," refer to the "packages of imported liquors stamped as above required," of the preceding clause, then the succeeding phrase, "in which distilled spirits, wines, or malt liquors have been imported," becomes wholly unnecessary and redundant. The construction proposed thus creates as great difficulties as it removes.

But if we accept the obvious and natural construction, and treat the words "such as is hereinbefore mentioned" (not "described"), as referring to the pipes, hogsheads, tierces, etc., enumerated in the eleventh section, then the words "in which distilled spirits, etc., have been imported," become necessary and appropriate to restrict their application to the class of objects intended, and meaning and effect is attributed to every word of which the sentence is composed.

The counsel for the claimants seeks to restrict the refer-

ence of the words "hereinbefore mentioned" to the "packages of imported liquors, stamped as required by law," spoken of in the preceding clause. But the object of that clause is to require that the stamps, etc., on such packages shall be effaced and obliterated when the contents are drawn off. If, then, there be any reference to the casks spoken of in this clause, it must be taken to be, not to stamped imported packages, but packages in the condition in which that clause leaves them, viz., with the stamps removed. It can hardly be supposed that congress meant to refer in so nonchalant a manner to casks in respect to which a violation of law amounting to a felony had been committed, and to provide that after this felony had been consummated, and the emptied casks, with the stamps remaining thereon, refilled with domestic spirits, the only penalty incurred should be the forfeiture of the cask and its contents.

It is further urged, that if the phrase in question be not construed to forbid the refilling of casks with the stamps, etc., remaining thereon, the fraudulent re-use of stamps is nowhere specifically forbidden by the act or by section 3324 of the R. S. which it adopts, and makes applicable to imported spirits. That object, however, is substantially attained by the requirement, under severe penalties, that the stamps shall be effaced, obliterated, and destroyed when the cask is emptied, and by the prohibition against the purchase or sale of any cask "which has once been used to contain imported liquors, with the stamps, marks, and brands required by law remaining thereon." But even if these provisions were wanting, the construction contended for would not cure the omission. For by that construction the re-use of stamps on casks refilled with domestic spirits, would alone be forbidden.

The equal or more serious offense of re-using them on casks refilled with foreign spirits, would be wholly unprovided for. An equally conclusive answer to the argument under consideration is furnished by the fact that the construction contended for would make the provisions of the act incongruous if not absurd. By section 3324 R. S., the

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failure to efface and obliterate the stamp when the cask is emptied, is declared a felony, and made punishable by a fine of not less than five hundred dollars nor more than ten thousand dollars, and by imprisonment for not less than one year nor more than five years. But under the construction contended for, the refilling of casks with stamps remaining thereon, which of course can only be done where the stamps have not been obliterated and effaced at the time of emptying, is punished merely by a forfeiture of the cask and its contents. The clause in question, if construed as desired, would fail to attain the end supposed to be sought. For no punishment for the re-use of stamped packages would be imposed at all commensurate with the law-makers' estimate of the gravity of the offense, as indicated in the section of the R. S. which has been cited.

It is further urged that no motive can be assigned for prohibiting the "use to contain domestic spirits" of emptied imported casks with the stamps removed therefrom; inasmuch as the dealer may lawfully use domestic casks made in exact imitation of a foreign package, or a foreign package imported empty, provided that they bear no imitation of the stamps, etc., required by law.

The reasons for not prohibiting the use of domestic packages made in imitation of the foreign are obvious. Congress did not think fit to prescribe the forms of packages to be used by distillers, or to restrain them from adopting any form of package which might be most convenient or advantageous. The packages used by some foreign distillers may be similar to our own, or our forms of packages may hereafter be adopted by foreigners. In either case it would be difficult to say which was the imitation. Congress has therefore been content to prohibit the use of imitation packages with imitation stamps and brands thereon. The use to contain domestic spirits of foreign casks imported empty, has not been prohibited. This may have been from oversight, or because the course of trade rendered such a prohibition unnecessary. But congress has prohibited, and in my opinion in very unmistakable terms,

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the use to contain domestic spirits of any package in which distilled spirits have been imported, and whatever the motive or the policy of the prohibition, the law must be obeyed.

I have thus noticed every important suggestion contained in the brief which has been submitted. The result of my re-examination has been to confirm my belief in the correctness of the opinion heretofore delivered.

THE ALLEGIANCE—DAVID MORGAN, CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.

• OCTOBER 29, 1879.

1. SALVOR, UNDERTAKING OF.—A salvor does not undertake to succeed in saving the property in peril, but only that he will exercise ordinary skill and diligence in the use of the means or machinery with which he undertakes the salvage service.
2. DUTY OF THE TOW.—It is the duty of the vessel in tow to keep in proper trim and tack, to follow the tug and steer accordingly, and if injury results to the tow from negligence or mistake in these respects, the tug is not responsible.
3. SALVAGE BY A STEAM TUG—COMPENSATION FOR.—Owing to its comparative independence of the winds and currents, a steam tug may perform a salvage service with comparative safety to herself, and therefore the matter of risk to herself and crew is to be estimated accordingly, in fixing the value of such service.
4. SALVAGE SERVICE, COMPENSATION FOR.—A steam tug of three hundred and four horse-power left Baker's bay, and overtook an iron ship of one thousand two hundred and thirty-five tons, worth forty-seven thousand dollars, drawing twelve feet of water, in ballast, drifting on to the west end of Chinook spit in seventeen feet of water at flood tide, near two hours before high water, with the wind blowing about eight from the south-south-east, and took her hawser and towed her under the lee of the east end of Sand Island, where, owing to the strength of the wind, which had increased to ten and veered to south-east by south, she was compelled to let her go in comparatively safe anchorage in twenty-three feet of water; but the ship, only letting go one anchor, dragged on to the spit, where she lay until next morning in about four or five feet of water at low tide, when the tug, and three others of near the same power

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and working under the same management, returned to her and pulled her off about two hours before high water, with a light breeze from the east by south, and the ship heading south by east, without any serious risk to the tugs or actual injury thereto: *Held*, that the service was a salvage service, and the compensation therefor fixed at five thousand dollars.

Before DEADY, District Judge.

John W. Whalley and M. W. Fechheimer, for the libelants.

Ellis G. Hughes and William H. Effinger, for the claimant.

DEADY, J. A. D. Wass and George C. Flavel bring this suit against the British ship *Allegiance* upon a cause of salvage, civil and maritime, for salvage service rendered by them to said ship with the aid of the steam tugs *Brenham*, *Astoria*, and *Columbia*, and their officers and crews, on January 10 and 11, 1879, in and near the north channel of the Columbia river, between black buoy No. 5 and the east end of Sand Island.

Upon due process and proceedings the vessel was seized and appraised at forty-seven thousand dollars, and delivered to the owner, David Morgan, of Anglesea, Wales, upon a stipulation in the sum of thirty thousand dollars. The answer of the claimant denies that the service rendered to the *Allegiance* was a salvage service, and avers that it was only a towage service, worth not to exceed two hundred dollars.

Afterwards, upon the stipulation of the libelants and claimant, A. M. Simpson, George Flavel, and A. D. Wass, as owners of the tugs, and E. Johnson, A. Malcolm, and D. M. McVicker, as part of the crew of the *Brenham*, were admitted to intervene herein as joint salvors with the libelants, and to become parties to the libel.

The testimony is somewhat voluminous, and upon some material points conflicting. The master, mate, and two pilots of the *Brenham*, the master of the *Astoria*, the master of the light-house tender, the *Shubrick*, and of a merchant vessel, the *McNear*, were examined as witnesses by the libelants; and the master and two mates of the *Allegiance*, the

master and two lieutenants and the boatswain and carpenter of the revenue cutter, the *Corwin*, for the claimant.

After an extended examination of the testimony, and a careful comparison of the disputed points with the known circumstance of the channel, spits and tides of the locality, and after weighing well the intelligence, means of knowledge, candor, and credibility of the witnesses, I find the material facts of the case to be as follows:

On the evening of January 9, 1879, the *Allegiance*, an iron ship of one thousand two hundred and thirty-five tons burden, two hundred and twelve feet in length, and drawing twelve feet of water, made the mouth of the Columbia river in ballast, on her way to this port. She stood off and on until morning, when, getting pretty close to the breakers, and no pilot coming to her aid, she crossed the bar at a quarter past ten o'clock, with a fair wind from the southwest, under her topsails, foresail, foretopmast staysail, and jib, and passed red buoy No. 2 on the starboard tack, about eleven o'clock, nearly one hundred and fifty yards to the eastward of the channel, with a whole-sail breeze from the south by east, her course being about north-east by east.

The master of the *Allegiance* had never been in the Columbia river before, but the mate had once, and told the master, as an inducement to come in without a pilot, that they would certainly find the steam tug and pilot in Baker's bay.

At this time the tug *Brenham* was lying at anchor near the wharf at Fort Canby in Baker's bay, well round the point of the cape, and the revenue cutter *Corwin* was at anchor in the same bay, about two hundred yards to the north-north-east of her.

The officers of the tug had known from early morning that the *Allegiance* was outside the bar, but had not gone out to give her a pilot or a tow because of the roughness of the bar. When the *Allegiance* passed the red buoy No. 2 the weather was getting thick, and she had not yet made out the entrance to Baker's bay, and the master probably

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thought it was ahead of him in the direction in which he was sailing.

Soon after the *Allegiance* passed the red buoy No. 2 she was sighted by the cutter, and it appearing to the master of the latter that the former was out of the channel, he gave the alarm by blowing his whistle. This attracted the attention of the *Allegiance* and she at once commenced to shorten sail, luffed up to the wind, and checked her way, but drifted on before the wind and tide in a north-east direction. The tide was flood and lacked about two hours of high water. The current was running in at the rate of three or four miles an hour, while the wind had a velocity of about eight, and was increasing.

As soon as the *Allegiance* passed the cape, the tug called her pilot from off shore, got up her anchor, set her flag, and started after the *Allegiance* to save her from being lost or going ashore, and overtook her about one and a half miles from the cape, beyond the black buoy No. 5, in seventeen feet of water, with her foretopsail and staysails, and fore and main lower topsails set, her yards braced sharp up, on the starboard tack, drifting, without headway, and within two hundred yards of the breakers on the west end of Chinook spit.

Here the *Allegiance* signified that she wanted the services of the tug, when the latter passed her a line, and took the ship's hawser, of about forty fathoms, on board, and commenced towing her out into the channel. By this time the wind had veered to about south-east by south. The tug put her helm hard a-port and tried to haul the ship around against the wind, to take her back into Baker's bay; but owing to the strength of the wind upon her starboard bow, and the fact that her sails had not all been taken in, and were aback, the tug was unable to do so, and then she commenced towing the ship in the channel towards Astoria. After towing her in this direction from three fourths of an hour to an hour under the pressure of seventy-eight pounds of steam and making from three fourths of a mile to a mile, the wind increased to ten, and the tug was unable to tow the ship any further, and both were drifting by the force of the

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wind and tide in the direction of the breakers on Chinook spit, whereupon the tug blew her whistle and signaled the ship to let go her anchor. The port anchor only was let go, and it was let go foul, the chain being around the stock, and when thirty fathoms of chain had run out and the anchor had bit or taken hold, the tug cut the hawser—it being unsafe to attempt to back and cast it off—and proceeded to Astoria for assistance.

At this time the ship was on the lee side of the channel in three and one half fathoms of water, with some of her sails not yet wholly furled. She paid out forty fathoms of chain on her port anchor; but it was not sufficient to hold her, and she dragged to the northward on the sands about two hundred yards. The starboard anchor being on the rail was not let go at the signal from the tug, but was let go about the time the ship got on the sands, and lay near her fore-foot until night, when it was hove up for fear the vessel might float upon it on the next high water.

Between three and four o'clock in the afternoon the tug *Brenham* returned from Astoria, accompanied by the tugs *Astoria* and *Columbia*, and found the *Allegiance* on the sands and two or three feet out of water, and being unable to render her any assistance at that time, proceeded with the *Columbia* to Baker's bay, while the *Astoria* remained in the vicinity for an hour and a half, and then joined her companions at the cape.

On the morning of the eleventh the three tugs went up to the relief of the *Allegiance* about nine o'clock, going within about one hundred and seventy-five yards of her. The weather was fair, with a light breeze from the east by south, and a considerable swell from the incoming tide. The pilot of the tug *Brenham*, E. Johnson, boarded the ship and attempted to negotiate with the master for a tow. The latter said he wanted a pilot and a tow, but declined to make any specific terms for compensation, and the result was that the *Brenham* and *Astoria* put their hawsers on board the ship, while the *Columbia* was ahead with her hawser fast to the *Brenham*. The pilot, Johnson, remained on board the *Allegiance*, and with the assistance of a portion of the cut-

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ter's crew, who had been put on board for the purpose, got in the anchor, which had then about fifteen fathoms of chain out. The ship was lying in a bed which she had made for herself in the sand, in about four or five feet of water, and as the tide rose and her sails more or less filled, she rolled in her bed, but did not move forward. The anchor came in through the sand without materially affecting the position of the ship. The tugs commenced pulling on her at about half past ten, and she came off at nearly twelve o'clock and about two hours before high water; when she was towed to Astoria by the tug *Brenham*, assisted by the *Columbia* as a matter of convenience, and not because such assistance was absolutely necessary.

At the time the *Brenham* first took hold of the *Allegiance*, the latter was in great danger of grounding in the breakers just to the northward of her, and must have done so, unless she had let go her anchors, only one of which was ready to let go, and probably then, as she was exposed to the whole force of the wind and tide setting her in that direction; and if the ship had been properly handled at the time the *Brenham* took hold of her, it is probable that she could have been then turned round and taken in safety to Baker's bay.

When the tug left the *Allegiance* inside of Sand Island, she left her in comparatively a good anchorage, by reason of the protection from the wind and tide by said island; and being unable to tow her any further or to turn her round, and take her to Baker's bay, she did the best that could be done under the circumstances, by letting her go when and as she did; and it is very probable that if both her anchors had been let go at once she would not have dragged as she did on the sands.

The *Allegiance* sustained no appreciable injury between the bar and Astoria; the tug *Brenham* incurred no extraordinary risk or danger in going to the *Allegiance* on the tenth, and towing her as she did; but both she and the *Astoria* did incur such risk and danger in pulling her off the sands on the eleventh, by touching the bottom on account of the swell and depth of water; but neither of said tugs sustained any appreciable injury therefrom.

On the morning of the eleventh, when the tugs came up to the *Allegiance*, she was lying hard aground, heading about south by east, thus showing satisfactorily that she did not ground simply by the ebbing of the tide, but that she dragged on to the sands in high water. She was in no immediate danger; but as the tide rose, and she commenced to float in her bed, and pound the bottom with the rise and fall of the sea, she would be in danger of springing a leak, and at high tide, if the wind had increased, as was probable, she would have gone farther up on the spit and beyond the reach of assistance, and ultimately been lost. Nor is it at all probable that the vessel could have been sailed off at high water. The tide, while it might lift her out of her bed so that she could float, would tend to set her higher on the spit, while the wind being about south-east by south, would have the same effect, until she had steerage way, which it is almost certain she could not obtain, under the circumstances, in time to get off.

As to the value of the tugs, there is no direct evidence. They are probably worth over one hundred thousand dollars. At the date of this occurrence there were four men employed on the tug *Brenham* at the aggregate monthly wages of three hundred and fifty dollars and found; besides which she carried two Washington territory pilots, E. Johnson and A. Malcom, who were in the employ of the owners of the tug, and turned over their pilot fees to the manager of the same, Captain George Flavel, and received from him monthly wages for their services. George C. Flavel was master of the *Brenham*, and D. M. McVicker the mate. A. D. Wass was master of the *Astoria*. The three tugs employed an aggregate of twenty-six men, including six pilots, whose monthly pay amounted to two thousand two hundred dollars, and found. The *Brenham* is of three hundred and four horse-power, the *Columbia* two hundred and thirty-eight, and the *Astoria* three hundred and ninety-two, but practically the *Brenham* is the most powerful.

The tug *Astoria* was owned by the libelants, A. M. Simpson, George Flavel, and A. D. Wass, and the *Brenham*

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by said Simpson and Flavel, and the *Columbia* by said Simpson.

The ordinary charge for towing a vessel from outside the bar to Astoria, is from one hundred and fifty to two hundred dollars, and the time usually occupied in such service is from four to eight hours.

The principal point made by the claimant to the contrary of these conclusions is, that the tug was in the wrong in not taking the *Allegiance* back into Baker's bay, when she first took hold of her on the ninth. But assuming that this could have been done under the circumstances, it was certainly the fault of the ship that it was not done. When the tug put her helm hard a-port and turned her head to the south-west, with the intention of making Baker's bay, the *Allegiance* would not come round, and the only alternative was to proceed up the channel for Astoria, and at least make an anchorage under the lee of Sand island. The reason the *Allegiance* did not come round was, that a portion of her sails had not been taken in, and as soon as her head came up to the wind, were aback; and that she was without steerage way.

The tug is not responsible for the steering or sailing of the tow. It was the duty of the latter to keep in proper trim and upon the right track, to follow the former and to steer accordingly. If there was any negligence or mistake in any of these particulars the tug is not responsible for the consequences. (*The Merrimac*, 2 Saw. 593.) Neither did the tug undertake that it was capable of towing the *Allegiance* under the circumstances, but only that it would try, and that it would exercise ordinary skill and diligence in so doing. The tug took hold of the vessel in an extraordinary emergency, with a view to save her from what appeared to be an impending peril, and therefore did not engage to do anything more than she could do with the aid of ordinary skill and diligence on the part of her master and crew. A salvor's compensation depends upon the success of the undertaking, but there is no implied obligation that he will succeed or that he is capable of so doing, and therefore he is only responsible for the exercise of ordinary skill and

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diligence in the use of the means or machinery with which he undertakes the salvage service.

The case is not like a mere contract for towage, where a tug meets or finds a vessel in a place of ordinary safety, and offers and agrees to tow her to a certain other point or place, as a mere business transaction. In such a case, undoubtedly, the master of the tug undertakes that his boat is properly equipped and of sufficient capacity and power to do the service in question at the time and under the circumstances proposed. (*The Merrimac, supra.*)

Upon this state of facts the libelants are entitled to recover as and for a salvage service, and the only question is as to the amount.

There is no standard by which the compensation for such service can be absolutely measured. In each case the amount to be allowed must depend largely upon its own circumstances, varying from one half the value of the property saved to something more than a mere compensation for towage. Where the service is rendered by a steamer to a sailer, it often happens that a material service is rendered to the latter by which it is rescued from a serious and impending danger with very little risk or trouble to the former or to its crew. A vessel propelled by steam has a command over its motion and direction comparatively independent of the winds and currents, and may therefore approach a vessel in danger and take her off with comparative safety to herself. In such cases, an important element in the value of the services, namely, the risk to the vessel and lives of the salvors, is more or less wanting, and they must be estimated accordingly.

The services rendered the *Allegiance*, both on the tenth and eleventh, by the tugs, were, in my judgment, timely and material. She was rescued on each occasion from an impending peril, and probably saved from becoming a total loss. But at the same time this service was accomplished with little more than the ordinary risk attendant upon a towage service to the tugs and their crews.

Under those circumstances, it is my judgment that five thousand dollars is a fair compensation for the services rendered, including a counsel fee in this suit to collect the same.

IN RE TEMPLE, A BANKRUPT.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 30, 1879.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.—Assignments for the benefit of creditors are governed in this state by the provisions of title III, part II of the Civ. Code, and not by those of the Insolvent Act of 1852.

Before HOFFMAN, District Judge.

Craig & Meredith, for petitioner.

L. D. Latimer, for assignee.

HOFFMAN, J. The point which the learned counsel for the petitioner discusses with much ingenuity and subtlety of argument has been authoritatively settled by the supreme court in *McIntyre v. Reed*, 8 Otto, 507. That case decides that where an assignment for the benefit of creditors, valid by the state laws or at common law, is set aside at the instance of an assignee in bankruptcy, the latter will take the property free of the liens of any judgments obtained after the execution of the assignment, and which would not have attached had the assignment been allowed to stand.

It is contended, on the part of the petitioner, that the assignment was invalid under the laws of this state. It appears to have been executed in entire conformity to the provisions of part II, title III of the Civ. Code of California. The heading of this title is, "Assignments for the benefit of creditors."

It appears, however, that by section 19 of the Pol. Code, it is provided that "nothing in either of the four codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the codes, except so far as they have been repealed or affected by subsequent laws." Among the statutes enumerated is "an act for the relief of insol-

vent debtors and the protection of creditors, approved May 4, 1862 [1852?], and the acts amending and supplementing such act." The thirty-ninth section of this act provides that "no assignment of any insolvent debtor otherwise than is provided in this act shall be legal or binding on creditors."

It is urged that under these provisions the validity of an assignment for the benefit of creditors must depend upon its conformity to the provisions of the insolvent law of 1852, and not to those of title III, part II of the Civ. Code, which expressly and exclusively treats of assignments of that description. But this construction of these conflicting provisions is, I think, quite inadmissible. The provision of the Pol. Code which has been cited was evidently intended merely to continue and keep alive the insolvent law of this state, which, though then in abeyance and superseded by the bankruptcy act of the United States, it was desired should revive and become operative upon the repeal of the bankruptcy act which was then anticipated and which soon afterwards took place.

The framers of the code overlooked the fact that among the forty sections of the insolvent law, one section, the thirty-ninth, declared "no assignment otherwise than as provided in this act shall be legal." That there could have been no intention to continue this section in force is evident from the fact that in the same body of laws which contains the provision supposed to have that effect, a title is devoted exclusively to the regulation of assignments for the benefit of the creditors, which on the construction contended for would be wholly inoperative.

I can not suppose that any member of the bar, consulted as to which statute should be followed by an insolvent desirous of making an assignment for the benefit of creditors, would hesitate to advise obedience to the provisions of the code on that very subject, rather than to those of the insolvent act of 1852, and especially if, when consulted, the United States bankruptcy act were in force, and the operation of the insolvent act, so far as it

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conflicted with the bankruptcy act, suspended and superseded.

My opinion, therefore, is that the assignment in this case, if made in conformity to the provisions of title III, part II of the Civ. Code, was valid under the laws of this state, and falls within the operation of the rule laid down by the supreme court in the case above cited.

JAMES AIKEN v. JAMES D. FERRY.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 7, 1879.

1. DECISIONS OF THE LAND OFFICE.—The action of the land office upon questions of fact arising in the course of its business, is conclusive upon other tribunals, unless it appears that such action is the result of fraud or mistake, other than an error of judgment in estimating the value of evidence, or making deductions therefrom; but for error in the construction or application of the law relating to such business, its decisions may be reviewed and modified or annulled by the courts.
2. RESIDENCE.—The pre-emption act requires a pre-emptor to inhabit the tract claimed by him, and this means to abide there—to actually reside upon the premises until the final proof and payment is made.
3. RIGHT TO CONTEST.—No one can be heard to question or contest the right of another to a patent for public land, until he shows some right in himself in or to the premises.
4. PRE-EMPTION RIGHT.—The right of pre-emption is not an interest in the land, but the right to be preferred as a purchaser of a certain portion of the public domain, and it accrues when the settler has complied with the prerequisites of the act by making his settlement and filing his declaratory statement.
5. PRE-EMPTOR, QUALIFICATION OF.—If a settler under the pre-emption act is a qualified pre-emptor at the time of filing his declaratory statement, he is entitled, as against the United States, to become the purchaser of the premises.
6. PROPRIETOR OF LAND.—The term "proprietor," as used in the inhibition contained in section 10 of the pre-emption act (5 Stat. 455; sec. 2260 R. S.), means an absolute and legal owner; and therefore where one owns land in trust for another, or has entered public land with cash or scrip, but has not received a patent therefor, he is not such a "proprietor" thereof, and is therefore not thereby disqualified to acquire the right of pre-emption.
7. PATENTEE, WHEN A TRUSTEE.—Upon an erroneous construction of the law relating to the qualification of a pre-emptor, the land office canceled

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the entry of A. and issued a patent to F., a junior settler, for a portion of the tract entered by A.: *Held*, that F. was a trustee for A. as to such portion, and must convey the same to him on receiving the purchase price thereof.

8. STATUTE OF FRAUDS.—A parol contract in relation to lands, if set out in the bill, is to have the same effect, as against the plaintiff, as if it had been made in writing.

Before DEADY, District Judge.

Waller W. Thayer, for the plaintiff.

Rufus Mallory, for the defendant.

DEADY, J. This suit is brought to enjoin the defendant from enforcing a judgment of this court for the recovery of the possession of the south-east quarter of the south-east quarter of section 2, and the north-east quarter of the north-east quarter of section 11 of township 27 south, of range 13 west, of the Wallamet meridian, and that the patent to said premises heretofore issued by the United States to George W. Pratt, the vendor of the defendant, be held to inure to the benefit of the plaintiff, and that the defendant be required to release his interest therein to the plaintiff.

The case was heard upon the bill, answer, replication, and exhibits, and the depositions of numerous witnesses.

The material facts established by the testimony are as follows: In 1863, James Aiken, the plaintiff, made a settlement and residence upon a defined portion of the public lands near the Isthmus slough in Coos county, Oregon, and within what proved to be township 27 south, of range 13 west, of the public surveys, with a view to acquire the title thereto under the pre-emption laws of the United States; and cultivated the same and made substantial and valuable improvements thereon. In the early part of 1869, and after the line between the said township 27 and township 26 had been run, the plaintiff concluded that the area of one hundred and sixty acres, which should include his then dwelling-house, would not extend to his southern and eastern line, and therefore built another dwelling-house upon the tract further east and south and on what is now known as

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the south-west quarter of the south-east quarter of section 2 of said township 27, and within the limits of the clearing and cultivation made by him before that time, and moved therein in the month of May of said year, and continued to reside there and improve and cultivate the premises, including a portion of the legal subdivisions in controversy, until after April 16, 1872.

The eastern line of the plaintiff's original location was a line drawn due north and south from a large dead fir tree standing in the north-east quarter of the north-east quarter of section 11, and two hundred and seventy-four feet west of the east line of said sections 2 and 11.

In March, 1869, George W. Pratt was living in a house belonging to the plaintiff near the Isthmus slough, when, upon the suggestion of the plaintiff, he determined to make a settlement upon a quarter section of the unsurveyed public lands lying immediately to the west of the plaintiff's settlement, and said plaintiff went with said Pratt upon the land and showed him said dead fir tree and his east line as aforesaid, and it was then and there understood and agreed, by and between said plaintiff and Pratt, that said line should be the actual boundary between their locations, and that if the line of the public survey should not coincide therewith, and either of them was, therefore, required to go beyond said agreed line to the nearest line of said survey in making his declaratory statement and proof of settlement before the register and receiver, he would, as soon as he obtained title, to his pre-emption, release or convey the same to the other back to said agreed line or boundary.

In pursuance of this arrangement, Pratt commenced to improve his location, and during the years 1869 and 1870 cleared three or four acres of the land to the east of the agreed line, and cultivated some portion of the same, but continued to reside with his family in the plaintiff's house on the slough. In June, 1870, Pratt commenced to clear a place for a house a short distance to the west of the agreed line, and in the fall of that year built a small house of sawed lumber thereon, and moved into the same with his family, where he resided until January, 1871. Between this

date and February, 1872, he did not reside upon the location. At the latter date he returned to the place and resided there until the latter part of the summer of 1872, and during the contest between himself and the plaintiff before the register and receiver, when he left the premises permanently. In September, 1870, when Pratt commenced to build this house, the plaintiff went upon the ground and protested against the act as a violation of his right and a breach of the agreement between them. Pratt admitted the agreement, but justified his conduct upon the ground that the plaintiff could not hold the land any way.

Township 21 was surveyed in October, 1871, and the plat and survey were approved in March, 1872.

On June 21, 1869, the plaintiff filed with the register and receiver his declaratory statement as a settler upon "un-offered and unsurveyed" lands, describing therein the premises by metes and bounds, and as "containing one hundred and sixty acres, more or less;" and on March 30, 1872, made his declaratory statement before the same officers as a settler upon lands "not subject to the private entry," and described as the south half of the south-east quarter of section 2, and the north half of the north-east quarter of section 11 in said township 27, and alleging a settlement thereon, on May 20, 1869; and on April 16 thereafter made final proof and payment therefor, and obtained a certificate from the officers aforesaid, to the effect, that he had become the purchaser under the pre-emption laws of the said legal subdivisions of the public lands.

On April 17, 1872, Pratt made a declaratory statement before the register and receiver as a settler under the pre-emption laws, for the south-west quarter of the south-west quarter of section 1, the south-east quarter of the south-east quarter of section 2, the north-east quarter of the north-east quarter of section 11, and the north-west quarter of the north-west quarter of section 12, alleging a settlement thereon on March 1, 1869; and on the thirteenth of May thereafter made final proof and payment therefor.

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After Pratt had filed his declaratory statement, alleging a settlement prior to that claimed by the plaintiff in his statement, the latter filed an amended statement, alleging that his settlement actually commenced in 1863, and that he had not deemed the date of the commencement of his settlement material, and asked to have his declaratory statement amended accordingly.

On August 2, 1872, the commissioner of the general land office suspended Pratt's entry because it was in conflict with the plaintiff's, and directed the register and receiver to appoint a day to hear the parties to the conflict. The contest was then heard before the register and receiver, who thereupon transmitted the case to the commissioner with their opinion in favor of the entry of Pratt.

On June 24, 1874, the commissioner decided the contest in favor of Pratt, upon the ground "that at the time Aiken filed for the tract claimed by him he was not a qualified pre-emptor, and has no right to the land in dispute," because, on January 22, 1872, he "was the owner in his own name" of section 36, township 26, range 13 west, although on March 12 of the same year he had sold and disposed of an undivided three-fourths of the same; and because on June 1, 1871, he, jointly with five others, located two thousand and eighty acres of public lands in the district of lands subject to sale at Roseburg, Oregon, upon agricultural college scrip issued to the state of Texas, and on the same day entered with said others for cash, at the land office in said district, three thousand five hundred and twenty acres, and on February 1, 1872, entered at the same place and in like manner one thousand five hundred and twenty acres of public land, thereby becoming the owner of a one-sixth interest in seven thousand one hundred and twenty acres of land, which entries and location were then in force and the interest of Aiken therein still owned by him.

On August 5, 1875, the acting secretary of the interior affirmed the decision of the commissioner, and on October 1, 1875, a patent was issued to Pratt in accordance therewith.

The opinion of the commissioner also finds that Pratt

commenced "a *bona fide* settlement on the tract claimed by him," on March 1, 1869, but that his residence thereon did not commence until 1870. It ignores the amended declaratory statement of the plaintiff, and gives the date of his original one incorrectly as April 5, instead of March 30, 1872; and also states the number of acres of land located by the plaintiff and others with agricultural college scrip, incorrectly at two thousand two hundred and eighty acres instead of two thousand two hundred and forty. But the decision of the commissioner in favor of the entry of Pratt and against that of the plaintiff was not made upon the question of the priority of settlement, but solely and explicitly upon the ground that Aiken was disqualified to enter lands as a pre-emptor on account of his interest in the other entries and locations aforesaid; which decision is alleged by the plaintiff to have been erroneous.

On December 22, 1875, Pratt conveyed the premises included in his entry to the defendant for the nominal consideration of eight hundred dollars cash in hand, but in fact for three hundred dollars cash and a promise to pay the remaining five hundred dollars when the right to the eighty acres, involved in this suit, should be finally determined in favor of Pratt, and the same is not yet paid.

This court is now asked to review the action of the land office in this matter, and the question arises at the threshold of the inquiry how far such action is binding and conclusive upon the courts. The general rule on the subject is very clearly laid down by the supreme court, but owing to the nature of the subject some difficulty and differences of opinion will sometimes rise in the application of it. In *Johnson v. Towsley*, 13 Wall. 83, Mr. Justice Miller, in delivering the opinion of the court, after admitting "the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others;" and that the action of the land office in issuing a patent for any of the public land, subject to sale, is conclusive of the legal title wherever this title must control;

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defines and limits the scope of judicial inquiry in such cases, as follows:

“On the other hand, there has always existed in the courts of equity the power, in certain classes of cases, to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments, issuing from the crown or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influences of frauds, false swearing, and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity, just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office.”

In the subsequent case of *Shepley v. Cowan*, 1 Otto, 340, Mr. Justice Field, in speaking for the court, says, that if the officers of the land department “err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts; * * * but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the president.”

Guided by the rule furnished by these cases, it is evident that this court can not review the action of the land office, however erroneous, if fairly and regularly had, upon the mere question of fact, as to which was the prior settler

upon the disputed premises, Aiken or Pratt. And therefore, although to my mind, it is as plain as proof can make it, that Pratt did not even commence to make his settlement upon the disputed premises until long after Aiken did his, and that he did not commence to inhabit it or actually reside upon the same, or erect a dwelling thereon, until the fall of 1870, at least eighteen months after the plaintiff had made his actual residence thereon, and years after he had cultivated and improved the same, still this court can not disregard or set aside a contrary finding by the officers of the land office, unaffected by fraud or mistake other than error in estimating the value of evidence.

But if the determination of that question hinged upon a question of law, as for instance—is it not absolutely necessary, to constitute a settlement under the pre-emption law, that the pre-emptor should erect a dwelling on the land and actually reside upon the same? and the decision of the land office thereon was erroneous, then this court, upon a proper case made, would set it aside.

Now, in this case, so far as appears, there was no actual decision as to which, Aiken or Pratt, was the prior settler in fact, but the contest seems to have been made upon the point that Aiken was not a qualified pre-emptor, and therefore could not make a legal settlement. The right of pre-emption is given by section 10 of the act of September 4, 1841 (5 Stat. 455; sec. 2259, R. S.), which provides that any one of a specified class of persons who may perform certain acts with reference to the public lands, shall be entitled to enter not more than one hundred and sixty acres thereof at the minimum price. These acts are: 1. Make a settlement in person on such lands; 2. Inhabit and improve the same; and, 3. Erect a dwelling thereon.

Now, nothing short of the performance of these acts makes a person a qualified pre-emptor of the public lands, or constitutes a settlement thereon. Inhabitation, an abiding or actual residence upon the land, is required, and until this begins a settlement is not made. Therefore, admitting the facts which the commissioner says are shown by the evidence, as a matter of law, it is plain that Pratt did not make

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a settlement upon the disputed premises until the fall of 1870, when he erected a dwelling thereon and commenced to inhabit the same; and that is confessedly long subsequent to the date of Aiken's settlement. But if the plaintiff was not a qualified pre-emptor, he can not be heard to object to the validity of Pratt's entry, which is, so far as he is concerned, a matter wholly between the latter and the United States. The plaintiff must first show in himself some right in or to the premises before he can question the validity of the defendant's title. (*Stark v. Star*, 6 Wall. 418.)

The material question, then, to be considered is, was the plaintiff a qualified pre-emptor? The pre-emption act (sec. 10, *supra*; R. S., sec. 2260) provides that "no person who is the proprietor of three hundred and twenty acres of land in any state or territory of the United States * * * shall acquire any right of pre-emption under this act." This "right of pre-emption" is not an interest in the land, but only the right to be preferred as a purchaser of a certain portion of the public lands at the minimum price, irrespective of its real value. (*Myers v. Croft*, 13 Wall. 296; 10 Opin. 57.) Such right must accrue upon the performance of the acts on account of which it is given. These are the settlement on the land, including its improvement and inhabitancy, and the filing of the declaratory statement.

If upon the filing of this statement the settler is a qualified pre-emptor, as against the United States, he is entitled to make the purchase, although he may not have been so when he went upon the premises, and by a parity of reasoning if thereafter and before he makes the entry he should become the owner of three hundred and twenty acres of land by inheritance or otherwise, he would not be thereby disqualified to make the purchase. True, the proof of the performance of these acts and the qualification of the settler must be furnished to the officers before the purchase can be made or the right of pre-emption exercised. But this is only the appointed means of making evident to the land office the facts which already exist, and on account of which the right of pre-emption is given.

Tried by this construction of the law, was the plaintiff a

qualified pre-emptor when he filed his declaratory statement, and thereby made his claim to be a pre-emptor on March 30, 1872?

And, first, as to his alleged interest in section 36 aforesaid. The fact is, as it clearly appears from the evidence, that the plaintiff did not acquire the whole of this section in January, 1872, from the state of Oregon, but only the south-west quarter thereof on January 22 of that year. The other three quarters of the section were conveyed to him by different persons on February 12, 13, and 16, 1872, respectively, but, in fact, in trust for others who furnished the money to pay for them, to whom the plaintiff conveyed the same immediately; but there being some defect in the conveyance, it was returned and another given in its place, which was not accomplished until March 12, 1872.

A person who owns land in trust for others is not a proprietor of such lands within the inhibition of the pre-emption act, and is therefore not thereby disqualified from becoming a pre-emptor.

But it does not appear that the evidence showing that the plaintiff held the three quarters of this section in trust only was before the land office, and therefore it does not appear that the question whether a mere trustee is a "proprietor," within the meaning of the pre-emption act, was before the commissioner, or passed upon by him. But the commissioner did find that the plaintiff had disposed of three quarters of this section, on March 12, 1872, and therefore was only the proprietor of one hundred and sixty acres of the same when he made his declaratory statement. His interest, then, in this section did not disqualify him from acquiring the right of pre-emption when and as he attempted to, and the ruling of the land office to the contrary was erroneous.

As to the scrip and cash entries for seven thousand one hundred acres of land, the case stands thus: Upon the evidence it clearly appears that the plaintiff, on February 19, 1872, conveyed all his interest in these entries to his brother, A. G. Aiken, who, on October 12, 1875, reconveyed the same to him; so that, upon the face of the record, the

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plaintiff had no interest in these lands when he filed his declaratory statement. The *bona fides* of these conveyances has been questioned by counsel, but the only ground for suspicion is the admitted facts and circumstances of the transaction. And I think that these are enough to put the party asserting that they were made in good faith to the proof of the same.

Upon this view of the matter, evidence has been offered tending to show the *bona fides* of the transaction. But it is not necessary to pass upon this question here. It does not appear that these conveyances were before the land office; and if they had been, and a question arose there as to their integrity, the decision thereon would not be subject to review here, upon the question of fact simply.

And this brings me to the question whether, on March 30, 1872, the plaintiff was the "proprietor" of the one sixth or any portion of the land included in the entries of June 1, 1871, and February 1, 1872. An entry of lands for cash or scrip gives the party making it a right to a patent therefor, if it be found regular and valid. But it does not pass the title which remains in the United States, until the patent issues. The person making the entry, if there be no valid objection thereto, as against the government, has a right to a conveyance of the legal title, but as the government can not be sued without its consent, such a right is little else than a mere moral one. After the entry, and notwithstanding it, congress has the power to withdraw the land from sale, reserve it for public purposes, or dispose of it to another. True, in the latter case, a court of equity may compel the patentee to convey to the one who has the prior equity by reason of his prior entry. Besides, the entry may prove illegal and unauthorized, and therefore be canceled and set aside.

I am aware that some expressions in the opinion of the court, in *Frisbie v. Whitney*, 9 Wall. 191, and the *Yosemite Valley case*, 15 Id. 86, particularly the latter, are to the effect that when a settler under the pre-emption law has complied therewith and paid the price of the land, he has a vested interest in the premises of which he can not be deprived.

But certainly this interest is not the legal title or estate which is necessary to make one a proprietor or owner in the full and legal sense of the word. Such an interest is nothing but an equity which there is no means of enforcing—at least so long as the government retains the legal title.

In my judgment, the proprietorship contemplated by the pre-emption act is a legal and absolute one, and not the mere equity of a land-office entry, which may or may not ripen into such ownership.

It follows from these premises, that the plaintiff at the time of filing his declaratory statement, or at any time thereafter, pending his entry and contest, was not the proprietor of three hundred and twenty acres of land, and therefore not disqualified to acquire a pre-emption right.

The patent to Pratt, so far as it includes the south-east quarter of the south-east quarter of said section 2, and the north-east quarter of the north-east quarter of said section 11, was therefore wrongfully issued upon an erroneous construction of the law, and he took the same in trust for the plaintiff, who was entitled to the patent therefor. The defendant took his conveyance from Pratt of this eighty acres without consideration and with knowledge of all the circumstances.

The equity of the case is with the plaintiff, and the only question is whether the defendant shall be required to convey to him the whole of this eighty acres, or only that portion of it lying to the west of the boundary agreed upon between Aiken and Pratt. Pratt having repudiated the agreement and the defendant denied it, the latter can not well now ask for its recognition and enforcement by the court. It may also be objected that the agreement is invalid, not being in writing. But so far as the plaintiff is concerned, that difficulty is obviated by the fact that the agreement has been set out by him in his bill, and thereby established with the same certainty and effect as if originally reduced to writing. Therefore, in granting him the relief sought, effect will be given to this agreement as set forth in his bill. (Story Eq. Pl., secs. 761-766.)

The decree of the court will be that the defendant be in-

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joined from enforcing his judgment in this court against the complainant, except to recover the possession of that portion of the south-east quarter of the south-east quarter of section 2, and the north-east quarter of the north-east quarter of section 11 aforesaid, lying east of a line running parallel to the eastern boundary of said legal subdivisions and one hundred and seventy-four feet west of the same; and that within sixty days hereof, the defendant convey to the plaintiff by a proper conveyance, with sufficient covenants against his own acts, to be approved by the master of this court, the remainder of said legal subdivisions—the plaintiff first paying to the defendant the sum of one dollar and twenty-five cents an acre therefor, either in lawful money or by applying such an amount upon the costs and expenses incurred by him in the prosecution of this suit, and that the defendant pay the plaintiff said costs and expenses.

ABBOTT v. POWELL ET AL.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 11, 1879.

JUNIOR MORTGAGEE—HOMESTEAD.—Where a mortgage was made on two pieces of real estate and a subsequent mortgage was made on one of them, and thereafter a homestead was declared in respect of the land not embraced in the second mortgage: *Held*, that the equitable right of the junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he had exclusive claim, could not be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee.

Before HOFFMAN, District Judge.

O. P. Evans, for plaintiff.

J. W. Winans, for defendant.

A. N. Drown, for Clay Street Savings and Loan Society.

HOFFMAN, J. I have carefully examined all the authorities furnished me by the learned counsel for the defendant. I am

unable to perceive that any of them are decisive of, or even discuss the principal point made in the case at bar. It is not disputed, that as a general rule, where a creditor has a claim on two funds, on one of which another person has also a claim, and such other person will be prejudiced by allowing the creditor to satisfy his debt out of the fund subject to both claims, equity will compel the creditor to resort in the first instance to the fund to which he alone has a claim, if it can be done without injustice to him or to the common debtor. (Story Eq. Jur., secs. 560-633.)

But this equity, it has been held, exists only in favor of junior mortgagees and other incumbrancers, and the application of the rule has been refused when asked for by a mortgagor. Thus, in Massachusetts, where a mortgage embraced homestead property, and also property not impressed with that character, an application that the latter should be first sold, and the homestead exempted if the other property was sufficient to satisfy the mortgage, was refused by the judge, and the decision sustained by the supreme court. (*Searle v. Chapman*, 121 Mass. 19.)

In this case, Gray, C. J., observes: "The power of a court of chancery to compel a mortgagee to resort, in the first instance, to one of several estates mortgaged, is exercised only for the protection of the equities of different creditors or incumbrancers, or of sureties, and not for the benefit of the mortgagor. As against him, the mortgagee has the right to enforce the contract between them, according to its terms, and is not obliged to elect between different remedies or securities."

In Wisconsin, the rule of equity was applied in favor of judgment creditors of the mortgagor, as against the mortgagee of the homestead, and the latter was compelled to foreclose his mortgage on the homestead, before being admitted to share with the other creditors in the proceeds of the remainder of the mortgagee's estate. (*White v. Polleys*, 20 Wis. 503.) But this rule was subsequently altered by statute. (Laws of Wis., 1870, c. 133, sec. 1.) So, in another case in the same state, where a mortgage embraced a homestead and a business lot, and the homestead had

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been sold to satisfy the mortgage debt, the court refused to set aside the sale so that the business lot might be sold first, it appearing that there were creditors of the mortgagor who had judgment liens on the business lot, which were not liens on the homestead. (18 Wis. 241.)

It is unnecessary, however, to cite from the authorities. I have mentioned these, merely to show the diversity of opinion which has prevailed as to the rights of the owners of homesteads as against mortgagees. In this state, it appears to be settled, that a mortgagee of lands not included in a homestead, can not compel a prior mortgagee, whose mortgage includes those lands and also the homestead, to resort to the latter before selling the lands mortgaged to the junior mortgagee. (*McLaughlin v. Hart*, 46 Cal. 639.)

It has also been held that the wife may, after a judgment against her husband has become a lien on the home property, file a declaration of homestead upon it, and acquire such an interest in it that she can compel the sheriff to exhaust the husband's individual property before subjecting it to sale. (*Bartholomew v. Hook*, 23 Cal. 277.) But neither of these cases contains the slightest intimation that where a person has made a mortgage on two pieces of property, and afterwards makes a second mortgage on one of them, the equitable right of the junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he has an exclusive claim, can be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. I have been referred to no case which hints at so inequitable a rule. The junior mortgagee, when accepting the security of a second mortgage, had a right to repose upon the protection afforded him by the familiar rule of equity, and to act upon the assurance that the first incumbrancer would be compelled to resort to the property on which he had an exclusive claim, before coming on the property covered by the second mortgage, and that no act of the mortgagor could deprive him of the right to compel him to do so.

If the mortgagor or his wife, by merely making a declara-

tion of homestead, could thus impair or destroy the security of the junior mortgagee, why might he not effect the same result by making a grant of the property exclusively embraced in the first mortgage? The declaration of homestead may be likened to a grant to himself and wife, for it operates an exemption of the property from the claims of his general creditors; and yet it will not be disputed that where the whole of an estate is mortgaged, and the mortgagor makes subsequent mortgages or sales of specific parcels of it, the subsequent incumbrancers have the right to compel the general mortgagee to satisfy his debt by selling in the inverse order of the sales or mortgages by the owner. (*Ram v. Reynolds*, 11 Cal. 20; *Cheevers v. Fair*, 5 Id. 337.) Any other rule would be injurious to the mortgagor himself. For after mortgaging his property for, it might be, an insignificant part of its value, he would be unable to sell or incumber any separate parcel of it. For the purchaser or incumbrancer would have no assurance that his parcel might not be first taken to satisfy the general mortgage.

The interests, then, of both owners and incumbrancers of land require that the equitable rule under consideration should be rigidly adhered to in all cases justly admitting of its application, and with such certainty as to permit reliance upon it as a vested right incidental to and inseparable from the rights created by the mortgage. I can conceive no reason, of justice or policy, why this right, which confessedly existed as between the first and second mortgagees, and which grew out of the contracts of the mortgagor himself, should be destroyed or impaired by the filing by the latter or his wife, of a declaration of homestead.

It is urged that the mortgagee in this case has lost the right to demand the application of the rule, because he had other securities on which he has released his lien, and the proceeds of which, when sold by the mortgagor, have been applied in part only, to the payment of the mortgage debt. And this result, it is urged, would ensue even if no homestead had been declared on the property. But this relinquishment by the mortgagee of a portion of the security, its sale, and the application of the proceeds, were done not

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only with the assent of the mortgagor, but must have been done by him, for he alone could make a title to the purchaser. The proceeds were applied no doubt in accordance with the agreement made when the mortgagee consented to waive his lien. The mortgagor can not be now heard to object to a transaction assented to and effected by himself. There are no junior incumbrances on the property which it is now asked shall be first sold. These, if they existed, might very possibly invoke the equitable rule under consideration, and demand that the whole proceeds of the property on which the mortgagee had an exclusive lien, should be applied in payment of his debt before he can compel the mortgagee prior to himself to sell first the property which is also mortgaged to them. The only subsequent incumbrance on the property covered by either mortgage is that created by the declaration of homestead. The rights acquired under that declaration have already been considered.

It is objected that the first security given was in the form of a deed of trust, which vested the legal title in trustees, and which is, in some respects, distinguishable from a mortgage in the ordinary form. This is true; but I do not see what effect it can have on the rights of the second mortgagee. The trust deed was intended as a security; no right is claimed under it, except to sell the property and execute the trust by paying the debt. The trustees submit to the direction of the court as to the mode of selling. They do not deny that they are bound by the same equitable rules which would be enforced against an ordinary mortgagee. The fact that the legal estate is in them, does not emancipate them from those rules, any more than an ordinary mortgagee would be released from their operation in those states where a mortgage is held, as at common law, to pass the legal title.

For these reasons I am of opinion that the application of the assignee should be granted.

THE BANK OF BRITISH NORTH AMERICA v. M. M.
ELLIS ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 12, 1879.

1. NEGOTIABLE INSTRUMENTS, POSSESSION OF.—The possession of a negotiable instrument imports, *prima facie*, that the holder acquired it *bona fide*, for value, in the usual course of business, without notice of any fact impugning its validity; and that he is the owner thereof and entitled to recover the contents from all prior parties thereto.
2. SAME—CONSIDERATION OF.—Inquiry into the consideration of a negotiable paper can only be made between privies or the immediate parties thereto—as the maker and payee or an indorser and his indorsee; all other parties are called remote, and as between them a consideration for making and indorsing the same is conclusively presumed; but a want of consideration may be shown by a defendant against a remote party, if the latter took the paper with the knowledge that such want could be shown against a nearer party.
3. SAME—ACCOMMODATION MAKER OR INDORSER.—A party who makes or indorses a note without consideration and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and can not show a want of consideration therefor against any one except the accommodated party.
4. DEFENSE, WANT OF CONSIDERATION.—A party to negotiable paper who seeks to make the want of consideration a defense to an action thereon, must not only allege such want of consideration, but also show how and why he is entitled to make such defense as against the plaintiff in any aspect of the case made in the complaint.
5. INDORSER.—An indorser's contract and liability is separate and distinct from that of the maker's; he agrees that the instrument will be paid, by himself, if not by the maker, and as his own debt and not that of another.
6. INDORSEMENT.—In the absence of anything to the contrary, an indorsement is presumed to have been made regularly, after the making of the instrument and the indorsement of the same by the payee and before its maturity, and the indorser thereby becomes liable, as such, to any subsequent holder of the paper, whether he then had any interest in the same or not, unless there was an agreement that he should be liable only as guarantor, which was known to the holder at the time of acquiring the paper.
7. INDORSERS, DISCHARGE OF.—When the holder of a negotiable instrument makes an early blank indorsement payable to himself, he does not thereby discharge subsequent indorsers from their liability as such.
8. ATTORNEY'S FEE.—A stipulation by the maker of a negotiable instrument for the payment to the holder thereof of an attorney's fee in case the same

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is not paid without action is a valid promise, and passes with the instrument to each and every holder thereof; and each subsequent party to such instrument becomes thereby responsible in like manner for such fee to each and every subsequent holder thereof.

Before DEADY, District Judge.

Ellis G. Hughes, for the plaintiffs.

H. Y. Thompson, George H. Durham, and W. M. Gregory,
for the defendants.

DEADY, J. This action is brought to recover the sum of two thousand and twenty-five dollars, alleged to be due the plaintiff on forty-three promissory notes, with interest, costs of protest, and an attorney's fee.

The complaint alleges that the plaintiff is a corporation organized in the united kingdom of Great Britain and Ireland, and that the defendants are citizens of Oregon; that all of said notes were made on May 1, 1878, and eight of them are payable on October 1, 1878, and the remaining thirty-five on January 1, 1879; that each of said notes was indorsed by said defendants, and thereafter and prior to their maturity the plaintiff acquired the same in the regular course of business, and is now the owner and holder thereof; and that "said notes falling due and remaining unpaid," the plaintiff procured the same to be protested.

The answer of the defendants contains sundry denials and three special pleas or defenses.

The first one alleges that the makers of said* notes received no consideration for the same, and "these defendants, indorsers of said notes * * * received no consideration for such indorsement," and that the plaintiff at the time it acquired said notes had knowledge of these facts.

The second one alleges that said notes were made in pursuance of an agreement between the makers thereof and the Dayton, Sheridan, and Grand Ronde railway company, that the latter would construct and put in operation by October 1, 1878, a branch of its railway from a place called Broadmeads to the town of Dallas; and were placed in the hands of the defendants, R. S. Crystal, J. D. Lee, and H. C.

Brown, as agents and trustees, to deliver the same to said railway company upon the completion by it of said contract; that afterwards said trustees, with the consent of said makers, delivered said notes to said railway company, upon its promise to perform said contract; but that said company has hitherto wholly failed to perform said contract, and the consideration for said notes has failed, and that the plaintiff had notice of these facts when it acquired said notes.

The third defense alleges that the defendants did not indorse such notes "until long after they were made;" that the same were made payable to the order of said railway company; that said defendants never had "any interest in said notes," or consideration for indorsing the same; and that the plaintiff at the time of acquiring the notes had knowledge of these facts.

The plaintiff demurs to each of these defenses because the same does not state facts sufficient to constitute a defense. Each of these defenses must stand or fall by itself, and without any aid from either of the others. (*Hall v. Austin*, 1 Deady, 107; *Bachman v. Everding*, 1 Saw. 72.) The first defense merely alleges that the notes were made by the makers and indorsed by the defendants without consideration—not that the consideration has failed, but that there never was any.

This is not a shadow of a defense to the action. The mere possession of a negotiable note imports, *prima facie*, that the holder acquired it *bona fide*, for value, in the usual course of business, without notice of any circumstance impeaching its validity; and that he is the owner thereof, entitled to recover the contents of the same from all prior parties thereto. (1 Dan. Neg. Inst., sec. 812; 1 Par. N. and B. 184; *Collins v. Gilbert*, 4 Otto, 754.) Here, the plaintiff not only alleges that it is the owner and holder of these notes, but that it acquired them before maturity in due course of business.

An allegation, then, that these notes were made or indorsed by the defendants without consideration, is no defense to its claim to recover. Inquiry into the consideration of negotiable paper can only be made between privies, or immediate parties thereto—as the maker and payee, an

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indorser and his indorsee. All other parties to negotiable paper are called remote, and as between them, a consideration for making or indorsing the same is conclusively presumed. But the defendant may make the defense of a want of consideration against a remote party, if he could have done so against a nearer party, and such remote party took the paper with a knowledge that it was open to this defense. (1 Dan. Neg. Inst., sec. 174; Par. N. and B. 175, 183.) And to this qualification of the rule there is an important exception in the case of accommodation paper. A party who makes or indorses a note without consideration, and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and can not make the defense of a want of consideration against any one except the accommodated party. The note is supposed to be taken by third persons upon the credit given to him, and he is expected to pay it. (1 Dan. Neg. Inst., sec. 189; 1 Par. N. and B. 183.) A party to negotiable paper who seeks to make the want of consideration a defense to an action thereon, must not only allege such want of consideration, but must go further, and show how and why he is entitled to make such defense as against the plaintiff, in any aspect of the case made in the complaint. In this case it does not appear from the plea that the defendants are entitled to avail themselves, as against this plaintiff, of the want of consideration for either making or indorsing these notes. The makers are not sued, and the question of their liability in this respect is not in the case. An indorser's contract and liability is separate and distinct from that of the maker's. An indorsement is not merely a transfer of the note, but it is also a fresh and substantive contract, by which the indorser agrees, among other things, that the note will be paid at maturity by himself, if not by the maker, and as his own debt, and not that of another. (1 Dan. Neg. Inst., sec. 669; 2 Par. N. and B. 23.)

For aught that appears here, there is no privity between the plaintiff and the defendants, and therefore it is immaterial in this action whether the latter received any consideration for their indorsement or not, unless it further

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appears that the plaintiff gave no consideration for the notes, and that no holder, intermediate between the plaintiff and the defendant, did so. (*Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. 191.) Again, it would not be inconsistent with this defense, if the defendants indorsed these notes without consideration for the accommodation of the makers or payee or its indorsee, and therefore they may be liable thereon, notwithstanding such want of consideration. The plea to be a good defense must meet this phase of the case by denying directly that the defendants were accommodation indorsers, or by stating facts inconsistent therewith.

The second plea is still less material than the first. It only alleges in effect that the consideration for the making of the notes, to wit, the promise of the railway company to construct and operate a branch road to Dallas by October 1, 1878, has failed. This may be so; but in an action by a holder of these notes against an indorser, such fact alone is wholly immaterial. Notwithstanding this, even the defendants may have indorsed these notes to the plaintiff, and received from it therefor their full value.

The third defense is also bad. The only fact which it contains in addition to the others, is, that the defendants did not indorse these notes "until long after they were made, and never had any interest in them."

In the absence of anything to the contrary, an indorsement upon negotiable paper is presumed to have been made after the making of the same and before maturity; and if such indorsement be made by any one other than the original payee, then after his indorsement. And, as between an indorser after maturity, and a subsequent holder of a negotiable note, the former is held liable as upon a note payable on demand, and even as an original promisor. (2 Par. N. and B. 9, 13; 1 Dan. Neg. Inst., sec. 928; *New Orleans etc. Co. v. Montgomery*, 5 Otto, 18.) This allegation as to the time when the indorsement of the defendant was made, only amounts to this, that such indorsement was made after the note was, which fact is consistent with the allegation of the complaint, and the defendants' liability to the plaintiff.

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But upon this fact and the allegation that the defendants never had any interest in the notes, it is argued by counsel that they are not in law indorsers, but guarantors, which is a collateral agreement and void unless made upon a distinct consideration.

What is the nature of the liability which a third person incurs who indorses a note before the payee thereof, has been a vexed question in the law and has been settled differently in different states. In the supreme court of the United States, the rule is established that such person is either an original promisor, a guarantor or indorser according to the nature of the transaction and the intent and purpose with which the indorsement is made; which may be shown by parol, upon the theory that such an indorsement is irregular and ambiguous. (*Rey v. Simpson*, 22 How. 350; *Good v. Martin*, 4 Otto, 94.)

But the allegation that the defendants did not indorse these notes until long after they were made, does not even imply that they indorsed them before the payee did—before they were put in circulation—but rather the contrary. Nor is it a sufficient allegation that they were indorsed after maturity.

The presumption is that the defendants indorsed the notes regularly—after the payee—and although they then had no interest in them, they are still liable to the plaintiff as indorsers, unless there was an agreement or understanding at the time that they were to be liable only as guarantors, and that this was known to the plaintiff at the time of acquiring the notes. But in favor of the plaintiff the defendants are presumed to have indorsed as payees; and for the purpose of maintaining this action against them, as such, the plaintiff may write over the indorsement of the original payee, "Pay to the order of the defendants," naming them, or any other contract or direction not inconsistent with what it knew to be the purpose of such indorsement. (2 Par. N. and B. 2.)

Besides, the defendants may have indorsed these notes for the accommodation of the maker, or the original payee, or its indorsee; and in such case the fact that they had no interest in the notes, and received no consideration for their

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indorsements thereon, is wholly immaterial, and would be just what every one, at all conversant with the subject, would ordinarily infer from the premises.

In the course of the argument for the defendants, it was suggested that if their defenses must be considered separately, application would be made to amend the answer so as to state the three in one; and counsel for the plaintiff, as a matter of convenience, has considered this as already done. But such an amendment will make no difference in the result. The plaintiff, being presumed to be the *bona fide* holder of these notes for value, before maturity, and such assumption not being negatived or contradicted by these pleas, *prima facie*, it is entitled to recover their contents from any and all of the prior parties thereto; and no plea is or can be a defense to this action unless it states facts sufficient to negative this conclusion, so far as the defendants are concerned, in any and every phase of the case made in the complaint.

Negotiable paper is the life-blood of commerce and business, and its circulation and usefulness would be seriously impaired if every maker or remote indorser thereof could set up a failure to keep the private understandings or agreements between himself and third persons, upon which he claims to have signed or indorsed the same, to avoid the payment thereof according to his obligation, as shown by the instrument, in the hands of a *bona fide* holder for value. Parties who put their names to or upon negotiable paper upon the faith of other people's expectations and promises, must not expect, if they are thereby deceived or disappointed, to throw the loss upon those who in good faith have taken their paper for what they or those whom they trusted gave it out to be.

The demurrer is sustained.

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Afterwards the defendants had leave to file an amended answer, to which the plaintiffs also demurred.

DEADY, J. The complaint alleges that each of said notes contained a stipulation, that in case suit should be instituted

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for the collection of the same, there should be paid such sum as the court might deem reasonable as an attorney's fee in said suit, and that two hundred and twenty dollars is such fee.

The amended answer denies that the plaintiff is entitled to recover any attorney's fee in this action; and for a further defense alleges that after said notes had been indorsed in blank by said Gaston and the defendants, the said Gaston negotiated the same to the plaintiff, and he became the owner thereof; that afterwards, and before the commencement of this action, the plaintiff wrote over said Gaston's name thereon a special indorsement to itself: "Pay to the — of the Bank of British North America, or order;" and "thereby released the defendants, and each of them, from any and all liability on said indorsements."

The answer also shows the order in which the indorsements were made on said notes, from which it appears that Gaston's name was written first, and those of the five defendants immediately thereunder; so that it was convenient, if not necessary, for the plaintiff, in writing the special directions thereon, making the notes payable to itself or order, to write the same as it did, immediately above the name of Gaston.

This defense assumes that the holder of a negotiable instrument, who makes an early blank indorsement payable to himself, thereby discharges all subsequent indorsers thereon from liability as such, the same as if he had stricken their names therefrom.

The only case cited which is directly in point, is that of *Cole v. Cushing*, 8 Pick. 48, in which it was held that such an act did not discharge the subsequent indorsers, but they still remained liable to the holder. To the contrary of this, there is a *dictum* or suggestion in 2 Par. on N. and B. 19, to the effect that "it might be said in such a case, that when the holder made the note payable to himself by the first indorser, he made himself indorsee of that indorser, and thereby discharged all subsequent indorsers."

The suggestion, "it might be said," however distinguished the source, scarcely amounts to a *quere*, and cer-

tainly can not overcome or cast doubt upon the well-considered decision in *Cole v. Cushing*, with which my own judgment wholly concurs.

It is not to be presumed that the holder of a note with a number of indorsers thereon will intentionally discharge any of them without some reason or consideration commensurate with the loss of security for his debt thereby sustained. The indorsers having no right to be discharged, the act of the plaintiff ought not to be construed to have that effect, unless it plainly appears that such was the intention with which it was done, than which nothing is more improbable.

The direction written by the plaintiff over the indorsements upon the notes, is not written over the signature of Gaston exclusively, and under the circumstances may be regarded as having been made with reference to those of the defendants as well as that of the former.

The defendants were without interest in the notes. They were mere accommodation indorsers, and their signatures could not and did not have the effect to transfer them to any one, but only to give them currency so as to enable Gaston to dispose of them as he did.

Under these circumstances, there is no room for the inference that the plaintiff intended by this act, even if it had no reference to the indorsements of the defendants, to discharge them from all liability thereon.

As to the attorney's fee, the defendants claim that the promise to pay one was only made by the makers of the notes, and that the subsequent parties thereto are under no such obligation to any one.

In *The Wilson Sewing Machine Co. v. Moreno et al.*, ante, 35, this court held that a stipulation to pay a reasonable attorney's fee to the holder of a promissory note in case suit is brought to enforce the payment of the same, is just and valid, and that the negotiability of such note is not thereby affected or impaired.

But the defendants herein claim that such a stipulation or contract is only the promise of the maker, and therefore not that of the defendants; and also that such stipulation,

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not being an integral part of the note, but a contract collateral thereto, is not negotiable, and therefore can only be enforced as between the immediate parties to it, the maker and payee.

In *Smith v. The Muncie National Bank*, 29 Ind. 158, it was held, that the acceptor of a bill of exchange which contained a stipulation for the payment of an attorney's fee, was bound to pay the same. But this conclusion rests upon the fact that the acceptor of a bill of exchange sustains the same relation thereto as does the maker of a note. In *Hubbard v. Harrison*, 38 Ind., a stipulation in a promissory note to pay an attorney's fee was enforced in an action by the indorser against the payee, who was in fact an accommodation indorser. It was implied rather than said by the court, that the note being negotiable notwithstanding the stipulation, the latter passed with the former, and might be enforced by the holder thereof against any party to the instrument. In 1 Dan. Neg. Inst., sec. 62, it is said that the attorney's fee need not be sued for by the attorney, but may be recovered by the holder; and that the liability therefor "as for every engagement, imported by the bill or note, enters into the acceptor's and indorser's contract."

While there is a conflict in the authorities upon the question of whether an instrument, otherwise negotiable, that contains a stipulation for the payment of an attorney's fee, is thus negotiable or not, no case has been cited which holds that such stipulation does not pass with the instrument, in case the same is deemed negotiable.

A stipulation in a negotiable instrument for an attorney's fee, which in effect provides for the payment of certain expenses of collection in case the same is not paid without suit, so far gives security and currency to such instrument, and is therefore to be regarded with favor as being a just and convenient means of promoting the general object and utility of the same.

At common law the compensation of an attorney consisted of the various items allowed for his services, called collectively his "costs;" and in case his client prevailed in the

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action, these were collected off the adverse party as a part of the judgment.

Substantially this stipulation for an attorney's fee is a substitute for the allowance of costs at common law, and enables a party taking a negotiable instrument to provide by agreement with the maker or indorser thereof, that if the same is not paid without suit, the holder shall recover his attorney's fee as well as the principal and interest.

The maker of these notes having agreed to pay an attorney's fee to the holder thereof if the same were not paid without action, in my judgment each subsequent party thereto assumed a like responsibility to such holder, and therefore the plaintiff is entitled to recover such fee from the defendants in this case.

But I think the defendants are liable to the plaintiff in this action for an attorney's fee, even if the stipulation therefor can only be enforced between the immediate parties thereto. The defendants are accommodation indorsers, in effect, makers of these notes. By their indorsement of them they authorized Gaston, the then holder, to transfer them to the plaintiff, which was done. Every stipulation in them and every obligation incident thereto thereby became the stipulation and obligation of the defendants, made directly to the plaintiff.

The demurrer is sustained.

THE KATE HERON—WALTER V. NILES, CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.

NOVEMBER 18, 1879.

1. **FORFEITURE.**—Whether a forfeiture given by statute takes effect upon the commission of the act on account of which it is given, or upon the seizure or condemnation of the property, depends primarily upon the intention of congress as evidenced by the language of the statute; but when that is doubtful or uncertain, resort may be had to the rules of the common law relating to forfeitures.
2. **RULE AT COMMON LAW.**—A forfeiture of lands at common law related to the time of the commission of the offense; but in case of chattels, the

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forfeiture did not take effect until the conviction of the offender, or a finding that he had fled.

3. "LIABLE TO FORFEITURE."—Section 4189 of the R. S., which declares that for the commission of a certain act a vessel "shall be liable to forfeiture," does not effect a present absolute forfeiture, but only gives a right to have the vessel declared forfeited upon due process of law, and the property in the same remains in the owner until seizure and condemnation, which latter relates back to the time of seizure, and invalidates all intermediate sales.
4. BONA FIDE PURCHASER.—A purchaser in good faith of a vessel liable to forfeiture under said section 4189, and before seizure, acquires the title thereto, and may hold the same against the United States.

Before DEADY, District Judge.

Rufus Mallory, for the United States.

Sidney Dell, for the claimant.

DEADY, J. This suit is brought by the district attorney on behalf of the United States, to enforce an alleged forfeiture of the schooner *Kate Heron*, her tackle, apparel, and furniture, for the violation of sections 4189 and 4377 of the R. S.

The libel contains two counts. The first one is drawn under the former of said sections, and alleges that on January 17, 1878, A. Y. Hamilton, as sole owner of said vessel, applied to the collector of the district of Wallamet for a license to carry on the coasting trade, and to that end took and subscribed before John P. Ward, a deputy collector of customs, the oath required by section 4143 of the R. S., to the effect, among other things, that he was the true and sole owner of said vessel, and that no subject of any foreign power was in any way interested therein or in the profits thereof; in both of which particulars said oath was knowingly false, in this: that Alexander McKenzie, a subject of Great Britain, was then a half owner of said vessel, and as such directly interested in the profits thereof; that by reason of such false and fraudulent representations such vessel was enrolled and licensed by said collector for the coasting trade, which enrollment and license were thus fraudulently obtained.

The second count is drawn under the latter of said sec-

tions, and alleges that on January 10, 1878, the *Kate Heron* being a licensed vessel was transferred in part by said A. Y. Hamilton, to Alexander McKenzie aforesaid, for the sum of eight hundred and fifty dollars.

The claimant excepts to the first count of the libel, for that it appears therefrom that said oath was taken before "a deputy collector of customs," and "not before the collector," and is therefore invalid; and answers the second count denying that at the time of the alleged transfer to McKenzie the *Kate Heron* was a licensed vessel, for the reason that prior thereto she had been conveyed to said Hamilton by William Thompson, whereby her license became revoked.

The answer also contains a plea in bar or peremptory exception to the whole libel, to the effect that on April 7, 1879, the claimant purchased the vessel from said Hamilton in good faith and for "a full and valuable consideration," without any knowledge of the alleged transfer, or that said vessel was liable to forfeiture.

The libellant excepts to this plea for the reason that it appears therefrom that the claimant purchased the vessel long after the forfeiture thereof accrued to the United States.

This plea does not purport to be made to either count of the libel, but upon the argument it was taken for granted that it applied only to the first count. Then, it follows that there is an exception to this count because it does not state a cause of forfeiture upon its face, and also an exception which admits such forfeiture, but avoids it as to the claimant.

These exceptions operate as a demurrer and plea in confession and avoidance to the same matter would at common law. I do not think they can be taken together, and therefore the latter must be construed as a waiver of the former.

The point of this first exception, however, is that, as the statute (R. S., sec. 4142) provides that a vessel shall be registered before "the collector," and (R. S., sec. 4141) that the owner's oath for that purpose shall be taken before the officer authorized to make such registry, such oath can not be administered by a deputy collector. Section 4312, R. S.,

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provides that the regulations concerning the registration of vessels shall apply to the enrollment thereof. Section 2630, R. S., authorizes the collector of customs, with the approval of the secretary of the treasury, to employ as many deputies as he may deem necessary, which deputies are declared to be "officers of the customs." Assuming that Ward was a deputy collector under this section, it is difficult to see why he was not authorized to administer this oath. The authority to appoint a deputy is explicit and unqualified. A deputy is one authorized to stand in the place of another—he exercises the office or right of another (Bouvier, *verbum* Deputy; Burrell, *Id.*)

The power of the deputy extended as far as his principal's, either under the administration of the law relating to customs or navigation. The exception, if not waived, is not well taken.

The validity of the defense set up in the plea depends upon the question whether the forfeiture declared in section 4189 of the R. S. takes effect upon the commission of the offense or upon the commencement of proceedings to assert the right of the government to the same.

At common law a judgment of death for treason or felony worked a forfeiture of the lands of the criminal, which, for the purpose of avoiding all alienations, had relation back to the time of committing the offense; while in the case of goods and chattels forfeited for the crime of the owner, the forfeiture arose upon the conviction or verdict, or a finding that the party had fled and had no relation backwards, so that a *bona fide* sale between the commission of the offense and the conviction or flight was not affected thereby. (2 Bac. Abr. 733; 4 Black. 381, 387; *U. S. v. 1960 Bags of Coffee*, 8 Cranch, 409.) But in the case last cited, the supreme court held that when an act of congress declares that a chattel shall be forfeited for the commission of a particular act, there the forfeiture takes place upon the commission of such act, and the statute operates to transfer the title at once to the government, so as to avoid all subsequent sales of the property, however innocent the purchaser.

Afterwards, the supreme court, in *Caldwell v. U. S.*, 8 How. 381, and *Henderson's Distilled Spirits*, 14 Wall. 56, held that where a statute declares a forfeiture absolutely, as that a particular thing shall be forfeited, for the commission or omission of a particular act, there the decree of condemnation relates back to the wrongful act, and the forfeiture takes effect from that time so as to avoid all subsequent sales.

But in *The United States v. Grundy*, 3 Cranch, 340, where the statute gave a forfeiture in the alternative, as follows, "There shall be a forfeiture of the ship or the value thereof," the court held that the government acquired no property or right in either until it elected which to take and commenced proceedings therefor; and this ruling was affirmed and followed in *Caldwell v. U. S.*, *supra*.

Section 4199 of the R. S., under which this count is framed, reads as follows: "Whenever any certificate of registry, enrollment, or license, or other record or document granted in lieu thereof, to any vessel, is knowingly and fraudulently obtained, or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel and furniture, shall be liable to forfeiture." This is section 24 of the act of July 18, 1866 (14 Stat. 184), "further to prevent smuggling and for other purposes," and is amendatory of section 27 of December 31, 1792 (1 Stat. 298), "concerning the registry and recording of ships or vessels."

The amendment consists in making the obtaining a certificate as well as the using of it a cause of forfeiture, and in the addition of the words "enrollment or license," thus making the section applicable to vessels engaged in domestic commerce as well as foreign. The language in which the forfeiture is declared is also changed from "shall be forfeited" to "shall be liable to forfeiture."

Does the section as it now stands impose a present, absolute forfeiture of the vessel, coincident with the commission of the unlawful act, or does it merely give the United States a right of action to have the same declared forfeited by due process of law?

The language used, "shall be liable to forfeiture,"

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imports nothing more than that the thing used in the commission of the unlawful act may be seized and adjudged forfeited to the United States. The word liable in no sense signifies a present and absolute loss, punishment, or injury, but only something which may befall the person or thing so situated. A surety is liable for the debt of his principal, that is, in a certain contingency—the default of the principal—he may be compelled to pay it. Soldiers are liable to be killed and sailors to be drowned, but neither of these liabilities is death. A fraudulent debtor is liable to imprisonment, but this of itself does not deprive him of his liberty. Webster defines “liable” thus, “Obliged in law or equity, subject;” and says it “denotes something external which may befall us.” As an illustration he quotes the lines from Milton:

But what is strength without a double share
Of wisdom? Vast, unwieldy, burdensome,
Proudly secure, yet liable to fall
By weakest subtleties.

In *The Rainier*, 1 Deady, 440, this court held that the provision in section 2 of the steamboat act of 1838 (5 Stat. 304), which declared that the vessel should be liable for certain penalties thereby imposed upon the owner, did not give the United States any interest in such vessel until a seizure thereof.

The substitution of the language, “shall be liable to forfeiture” for “shall be forfeited,” indicates that it was the intention of congress when it enlarged this section, so as to make it applicable to vessels engaged in domestic commerce, to change the time when a forfeiture for its violation should take place, so that such vessels might be bought and sold without the danger of an innocent purchaser being affected by the secret taint of a prior, but unknown, violation of the law.

Both the language of the statute and the reason of the thing concurring to show that the section does not work a forfeiture coincident with the commission of the unlawful act, it is proper, in the words of the court in *U. S. v. 1960 Bags of Coffee*, 8 Cranch, 409, “to resort to

analogy and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion," as to when and against whom the forfeiture was intended to take effect.

As has been shown, at common law, goods and chattels forfeited for the personal offense of the owner, did not become the property of the king until after the conviction or *fugam fecit* found, so that a sale to a *bona fide* purchaser between the commission of the offense and the verdict of guilty or flight was a valid transfer of the property. But when the forfeiture is made, as in this case, to attach to the thing by means of which the offense is committed, the proceeding to declare the forfeiture may be and usually is commenced by a seizure of the offending property. In such case, the forfeiture, when found, related back to the seizure so as to cut off intermediate sales. The reason of this distinction is apparent. By the act of seizure the owner is divested of the possession, and thereafter no one deals with the owner upon the faith of it. The property being taken into the custody of the law upon a charge of having been instrumental in the commission of a wrong, whoever purchases it does so at his peril and subject to the claim of the government upon which such seizure took place.

And such, I think, is the effect of the statute. It does not work a present forfeiture of the vessel, but only makes it liable to forfeiture by due process of law. But until a seizure is made for the purpose of enforcing this liability, the title to the vessel is in the owner, and a purchaser from him in good faith acquires the same, and may hold the property against the government, which by neglecting to assert its right has lost it.

In this case, the transfer of the vessel to the claimant was made on April 7, 1879, while the seizure did not take place until the twenty-ninth of the following August, at which time Hamilton had no interest in the vessel, and therefore it was no longer liable to forfeiture as his property, and for acts done before the sale to the claimant.

The plea is good, and the exception thereto is disallowed.

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JAMES B. STEVENS v. CRAGIE SHARP.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 21, 1879.

1. **LIMITATION.**—Cases of constructive trust being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief thereon; and when the trust arises out of the fraud of the defendant, or those under whom he claims, there is no fixed rule upon the subject, but each case is decided according to its own facts and circumstances.
2. **LOCAL STATUTE OF LIMITATIONS.**—A state statute of limitation is not applicable in the national courts in a suit in equity, but under ordinary circumstances, the limitations prescribed therein will be regarded as reasonable.
3. **PATENT—MISTAKE.**—A married settler, under the donation act, fraudulently procured a certificate and patent to the wife's share of the donation to be issued to a woman not his wife: *Held*, that a court of equity had jurisdiction to correct the error by requiring the patentee or her assigns to convey the premises to the wife or her assigns.

Before DEADY, District Judge.

Joseph N. Dolph, for the plaintiff.*W. Scott Bebee*, for the defendant.

DEADY, J. This suit is brought to enjoin the defendant from enforcing a judgment obtained by him in this court against the plaintiff for the recovery of the possession of the north half of the donation of Edward S. Sexton and wife, situate in Washington county, the same being the south half of the south-east quarter of section twenty, and all of section twenty-nine except the north half of the north-west quarter thereof, in township one south, of range one west, of the Wallamet meridian, containing three hundred and twenty acres, and to have the defendant convey the legal title of the same to the plaintiff.

Upon reading and filing the bill, September 1, 1879, an order was made that the defendant show cause why a provisional injunction should not issue. The defendant showed cause by demurring to the bill, which was argued by counsel on October 8, 1879. The material facts stated in the bill are as follows:

That in January, 1843, in Fulton county, Illinois, one

Edward S. Sexton was married to Angeline Bilshee, which marriage remained in full force and effect until the death of said Sexton; that prior to March 20, 1850, said Sexton left said Angeline and three children in Illinois, and came to Oregon, where he, pretending to be unmarried, in March, 1850, intermarried with India Stephens, the daughter of the plaintiff; that on September 1, 1853, said Sexton settled upon the premises as a married man, under the donation act, and resided upon and cultivated the same for four consecutive years, and otherwise complied with said act; that on January 31, 1868, a certificate was issued by the register and receiver of the proper land office to said Sexton and his wife for said donation, in which the north half thereof was designated as the part inuring to the latter, and the south half to the husband; that in procuring said certificate to be issued, said Sexton falsely and fraudulently pretended and represented to said register and receiver that said India was his lawful wife, and thereby procured and caused said certificate to be wrongfully issued to said India as the wife of said Sexton; that on May 5, 1873, a patent was issued for said donation, upon and in pursuance of said certificate, in which said India was erroneously described as the wife of said Sexton, and the premises in controversy confirmed to her as such; that the plaintiff, on July 7, 1876, purchased the south half of said donation from said Sexton; that in 1870-71, said Angeline and descendants set up a claim to said donation, and the plaintiff offered to assist said India to defend against the same, when said India informed him that she had known for years of the existence of said Angeline, and that she had no doubt that she was the lawful wife of said Sexton, whereupon he purchased the interest of said Angeline and descendants in said donation for the sum of two thousand five hundred dollars, and is now the owner and in possession of the same; that in October, 1873, said Sexton being dead, said India intermarried with one Samuel Rolfe, and in July, 1878, and during her last illness, said Rolfe procured said India to join with him in a conveyance to the defendant of all their interest in the donation; that in May, 1879, said

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defendant commenced an action in this court against the plaintiff to recover possession of the north half of said donation, in which he obtained judgment for such possession and one hundred and eighty dollars damages and costs; that said judgment was obtained solely upon the ground of the patent to India, and that until the same was given, the plaintiff supposed he had the legal title to the premises.

The grounds of the demurrer are: 1. That the court is without jurisdiction; 2. That the suit is barred by the lapse of time; and, 3. That there is no equity in the bill.

The first ground is certainly untenable, and was not insisted upon in the argument.

The objection that the suit is barred by lapse of time rests upon the assumption that section 378 of the Or. Civ. Code, which provides in substance that no suit of equity shall be maintained to affect a patent, unless the same is brought within five years from the date thereof, applies to a suit in this court.

But, as was held by this court in *Hall v. Russell*, 3 Saw. 514, and *Manning v. Hayden*, 5 Id. 360, this statute is not applicable to suits in this court. In the latter case the rule applicable to this case is laid down as follows:

“In the consideration of purely equitable rights and titles, courts of equity act in analogy to the statute of limitations, but are not bound by it. * * * In cases of implied or constructive trusts, when it is sought for the purpose of maintaining the remedy, to force upon the defendant the character of a trustee, courts of equity will apply the same limitation as provided for actions at law. * * * But when the trust is constructive and also arises out of the fraud of the defendant, there does not appear to be any fixed rule upon the subject. The matter is left to the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject to the qualification, that diligence must be used to establish a trust by implication, and that equity will not aid a party to enforce such a trust when the demand is stale or where there has been long acquiescence in the wrong.”

Although a few days over six years had elapsed when the

action was brought by the defendant, which has resulted in this suit, still, practically speaking, there has never been any actual acquiescence by the plaintiff in the alleged wrong, because he has been in the undisturbed possession and enjoyment of the premises since before the date of the patent, with the knowledge and apparent acquiescence of the pseudo wife, and those claiming under her, until the commencement of this litigation. Under the circumstances, he can only be charged with an omission to bring a suit to quiet his title against a claim which was not asserted, and which, as he might well think, under the circumstances, never would be.

The patentee, or those claiming under her, had by the law of the state twenty years after the plaintiff took possession, within which to bring an action to assert her right under the patent; and in my judgment it is time enough for the party in possession to resist or countervail such right when it is asserted or set up. Indeed, in a case of fraud, a delay of thirty years has been held not a bar to relief. (*Mechoud v. Girod*, 4 How. 561.)

But I admit that this court, sitting as a court of equity, when called upon to determine what delay will make a claim stale or show a want of diligence in its prosecution, so as to bar a suit thereon, should have regard to the periods prescribed by the law of the state in similar cases, as evidence of what is deemed a reasonable rule in this locality upon that subject. This being so, it must be borne in mind, that on October 17, 1876, and before the commencement of this litigation, the legislature amended section 378 so as to make the limitation therein ten years instead of five, and also declared that a party in possession, and equitably entitled to the land as against the patentee, might enforce his equity against such patentee, either as defendant in an action at law brought by the patentee to recover such possession, or by a suit in equity within the time such action for the possession might be brought. (Ses. Laws, 25.) This is the latest legislative expression of what is deemed a convenient and just rule on this subject, and this court may safely hold in analogy to it, that in the general a

suit brought to affect a patent at any time within ten years from the date thereof, is brought within a reasonable time. But there may be cases in which a less time would be a bar to relief, and others in which twice that time would not be unreasonable, and such I think is this case.

The plaintiff is in possession and has been since before the date of the patent, with little or no reason to apprehend that the claim of the pseudo wife as patentee of the premises, would, under the circumstances, ever be asserted against him, and now brings this suit to defend such possession against the defendant's action to deprive him of the same upon said patentee's bare legal title.

The plaintiff is entitled to maintain this suit notwithstanding the lapse of time since the issuing of the patent.

The only other question arising upon the demurrer is whether this court can grant relief against the fraud committed by Sexton in falsely representing to the land department that India instead of Angeline was his wife, and the consequent mistake made by it in the issuing of the certificate and patent to said India instead of Angeline.

The donation act (9 Stat. 49, sec. 4) gave the wife of a settler thereunder one half of the grant in her own right on account of her wifeship. No other qualification was required on her part to enable her to claim and take one half of the donation. (*Vandolf v. Otis*, 1 Or. 153; *Lamb v. Starr*, 1 Deady, 362; *Fields v. Squires*, Id. 376.)

It is admitted that Angeline was the wife of the settler upon this donation, and not India, and therefore it follows necessarily that Sexton committed a fraud upon her, when, in making proof of his marriage before the register and receiver, he falsely represented that India was his wife, and thus procured the certificate and patent to issue to India, when they should have issued to Angeline. It seems hardly necessary to ask the question whether a court of equity can grant relief against such a gross fraud and palpable mistake as this. In my judgment, there can be no doubt about it. (*Johnson v. Towsley*, 13 Wall. 83; *Shipley v. Cowan*, 1 Otto, 340.)

In these cases, the supreme court affirm that courts of

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equity have jurisdiction to inquire into, and modify and annul the action of the land department for fraud or mistake other than an error of judgment in estimating the value or effect of evidence. (See also *Aiken v. Ferry*, ante, 72, decided in this court.)

Upon the bill, the plaintiff is clearly entitled to the relief sought. The demurrer is therefore overruled.

THE STEAMER ANCON.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 22, 1879.

1. COLLISION.—Steamer adjudged in fault for not keeping out of the way of a schooner seen to be approaching her nearly bows on, at the distance of a mile and a half.
2. LOOKOUT.—The duty of unremitting attention on the part of a lookout enforced.
3. IF THE NIGHT WAS FOGGY, as claimed by the libelants, the steamer should have blown her whistle and moderated her speed, both of which precautions she neglected until too late.
4. IF SUFFICIENTLY CLEAR to permit an approaching vessel to be seen at the distance of a mile and a half, her negligence in not keeping out of the way was inexcusable, if not unaccountable.
5. CHANGING COURSE, FAMILIAR EXCUSE.—The familiar excuse set up by the steamer, that the schooner changed her course and ran across her bows, rejected as not supported by the testimony; and because, if it did occur, as stated by the steamer's second officer and lookout, the steamer had ample time to avoid the disaster.

Before HOFFMAN, District Judge.

Milton Andros, for plaintiffs.

McAllister & Bergin, for claimants.

HOFFMAN, J. At about a quarter before five o'clock on Saturday morning, September 15, the schooner *Phil Sheridan*, bound on a voyage from this port to the Umpqua river, state of Oregon, was run into by the steamer *Ancon*, and received such injuries as caused her shortly afterwards to capsize and become a total loss.

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At the time of the accident two persons were on the deck of the schooner—the helmsman, and a lookout forward. The schooner was sailing close hauled to the wind, and heading towards the land on a north-east half north course. Her speed is stated by those on board to have been from two to two and a half knots per hour. The claimants' witnesses, however, suppose that a four-knot breeze was blowing; but this opinion is the result of an estimate of its velocity founded on the course of the smoke issuing from the steamer's smoke-stack, a method of determining the rate at which a schooner, close hauled to the wind, was actually sailing, which seems quite unreliable. In the view I take of the case, the point is immaterial.

Upon taking the wheel at two o'clock A. M., the helmsman had been instructed by the mate to keep a good lookout for the land, towards which the vessel was heading. He was first apprised of the steamer's approach by hearing the noise of her wheels, and supposing it to be the sound of breakers on the beach, he gave his wheel a round turn, and, fixing it with a diamond screw with which it was provided, he ran forward to see if the shore was discernible. Almost immediately on reaching the forward part of the vessel, he discovered the steamer looming through the darkness some two or three hundred yards distant, and bearing down upon the port bows of the schooner. The men endeavored, by shouting, blowing the fog-horn, etc., to attract the attention of the steamer; and the helmsman, rushing aft, found the captain—who had been aroused by the noise—at the wheel, with the helm hard-a-port. The collision occurred a few seconds afterwards, and was in fact inevitable from the moment the steamer was first discovered by the schooner.

It is not denied that the schooner was provided with lights, set and burning as required by law. It is also in proof that a fog-horn was blown at short intervals for about twenty or thirty minutes previous to the collision. The failure of the schooner not sooner to discover the steamer is accounted for by the circumstance that a dense fog prevailed, which rendered it impossible to do so. On this point the testimony is irreconcilably conflicting, not

merely because the claimants' witnesses deny that a fog prevailed—although they admit that the night was very dark, that the sky was "clouded" and overcast, and that it was "smoky"—but because, if the second mate is to be credited, the schooner was first seen by him at a distance, he "can safely say," of one and a half or two miles. Her green light was also seen by Meihan, the watchman, as he says, at the distance of seven hundred yards.

The schooner was struck near her forward rigging on the port side, and, swinging around under the force of the blow, fell along side of the steamer on her starboard side. No effort was spared to rescue her crew and passengers, and they were all, though with imminent peril to one of them, transferred to the steamer. The steamer lay near the schooner some three quarters of an hour or fifty minutes, when the master of the steamer, observing that the schooner had fallen over on her side, with her sails in the water, abandoned all hope of saving her and proceeded on his voyage.

The evidence in the case is very voluminous. Much of it, however, relates to matters comparatively immaterial, and much of it to matters so clearly established by proof as to obviate the necessity of a critical comparison and analysis.

The case may almost be determined on the testimony of one witness—Mr. Douglas, the second mate of the steamer, the officer of the deck at the time of the collision—and by applying to the facts, as stated by him, a few well-settled and familiar rules of law.

Mr. Douglas testifies that when he first saw the schooner he was standing about twenty feet from the stem of the steamer, forward of the standard compass. He had relieved and taken the place of the regular lookout, and given him permission to go below to get some coffee. He first saw the vessel, but not her lights, at the distance of one and a half or two miles. She then bore about one point, or a little better, on his starboard bow; two or three minutes later he saw the schooner's green or starboard lights. He then gave orders to the quartermaster to starboard the helm, and the

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vessel went off about two points towards the shore. This he verified by the compass, but "thought," he says, "that the course of the vessel was not altered quite fast enough." He does not appear, however, to have acted on that impression by repeating his order to the helmsman. At the time this change in the steamer's course was made, the schooner was distant about a mile.

The account given by Mr. Douglas of the succeeding occurrences is obscure and inconsistent.

On his direct examination he states that, after changing his course two points, as above described, he "thought he instantly saw two lights." He "then walked aft, about 'ten feet beyond the pilot-house, and notified the quartermaster that he had lost the appearance of the lights—to look out.' He answered me, 'Yes, sir.'" "I then walked forward to the compass and looked at the compass again, and looked out for them again, and I saw they were coming very near, and I then ordered him to stop; seeing the red light, the flame, I ordered him to stop her; I then ordered him to blow the whistle, and he blew the whistle; I then ordered him to put his helm hard-a-starboard; I ordered him to blow the whistle to alarm the people, for I knew there would be a collision then."

On his cross-examination, in reply to an inquiry, how long after he saw the green light both lights came in view, he says: "That was instantaneous—probably two or three minutes after. It was so instantaneous that it confused me. That was when I ordered the quartermaster to look out—that he was changing his course."

The schooner was then, he says, probably half a mile or three quarters of a mile off. The two lights were in sight about half a minute. He then went aft to warn the quartermaster, and on his return only the red light was visible. The schooner was then "close aboard; probably two hundred and fifty yards off." It was then that he gave orders to stop and to put the helm hard-a-starboard. The helm up to this moment had remained as he had first ordered, viz., two or three spokes to starboard. In a subsequent part of his deposition the witness admits that, when he gave the

order to stop, the schooner was within two hundred and fifty feet of the steamer. He also states that the collision occurred almost instantly on his return from the pilot-house, and that the time during which the schooner was not under his observation was about three minutes. He subsequently says, that on reflection he is inclined to think he has over-estimated this interval.

The above is the substance of Mr. Douglas' testimony, expressed in his own language. Assuming his account to be in all respects accurate, there can be no doubt that the steamer was in fault. A vessel is descried at the distance of one and a half or two miles; she is run down by a steamer which had, by stopping, backing, or changing her helm, absolute control of her movements.

It is apparent from Mr. Douglas' narrative that, with the exception of starboarding the helm two spokes, nothing was done by the steamer to warn the approaching vessel, or to avert the disaster. The testimony clearly shows that the blowing of the steamer's whistle, the stopping of the vessel, and the putting the helm hard-a-starboard, all took place too late to be of service, and when the collision was inevitable. When the lookout was permitted to go below, he was not relieved by another of the crew. The officer of the deck undertook to act as his substitute. So negligently did he perform his self-imposed duties, or rather so negligently did he attempt to discharge the duties of lookout and of officer of the deck at the same time, that he deserts his post, goes to the pilot-house, and only regains his station (after an absence of, as at first stated by him, three minutes) at the moment of the collision. At the speed at which the vessels were approaching each other, more than half a mile of the interval between them would be traversed in that time.

The absence of a competent lookout is of itself a circumstance strongly condemnatory, and clear and satisfactory proof will be exacted that the misfortune encountered was not attributable to her misconduct in that particular. (*The Alabama and the Gamecock*, 1 Bened. 489, 490; *The Armstrong*, Brown's Adm. 135; *The Bataiver*, 9 Moore, P. C. C. 300, 301; *The Blossom*, Olc. 194; *The Colorado*, 1 Otto; 694—

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699; *The Europa*, 2 E. L. and Eq. 563, 564; *The Farragut*, 10 Wall. 337; *The Genesee Chief*, 12 How. 462, 463; *The Iona*, 2 Mar. L. Cas. 133; *The Java*, 14 Blatchf. 529, 530; *Killam v. The Eri*, 3 Cliff. 461; *The Londonderry*, 4 Not. Cas. Supp. 41-6; *The Northern Indiana*, 3 Blatchf. 104; *The Sea Gull*, 23 Wall. 174-177; *The New Orleans*, 8 Bened. 103-105; *Ward v. The Ogdensburg*, 5 McL. 633-636.)

Nor will the captain or officer of the deck be accepted as competent lookouts. (*Chamberlain v. Ward*, 21 How. 570; *The Comet*, 9 Blatchf. 327; *The Northern Indiana*, 3 Id. 106, 107; *The Ottawa*, 3 Wall. 273.) Nor the pilot and helmsman. (*Alabama and Gamecock*, 1 Bened. 483; *The Genesee Chief*, 12 How. 463; *The Ottawa*, 3 Wall. 273; *Rusk v. The Freestone*, 2 Bond. 241; *West. Ins. Co. v. Goody Friends*, 2 Id. 473.) Nor the steward and passengers. (*The Gratitude*, 3 Bened. 110; *McGrew v. The Melnotte*, 1 Bond. 458, 459; *Amoskeag Co. v. The J. Adams*, 1 Cliff. 410.)

The want of a lookout is not excusable because all hands are called to haul in a damaged mainsail, or to reef sails, or to haul down the flying jib, or to stow the anchor, or by a custom for all the ship's company to stand lookout the first day of the voyage. (*Whitridge v. Dill*, 23 How. 453; *The Catherine v. Dickinson*, 17 Id. 177; *Thorp v. Hammond*, 12 Wall. 414; *The H. P. Baldwin*, Brown's Adm. 309; *The Lady Franklin*, 2 Low. 222; *Sturges v. The Mazeppa*, 9 N. Y. Leg. Obs. 329, 330.)

The authorities I have cited sufficiently illustrate the inflexible rigor with which the rule which requires a competent lookout to be stationed, and that he be vigilant and unremitting in the discharge of his duty, is enforced.

"When strong evidence in a case of collision tends to show that the catastrophe was owing to the failure of the lookout of the libeled vessel to attend to his duty, every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated, until she vindicates herself by testimony conclusive to the contrary." (*The Ariadne*, 13 Wall. 475.)

The proof in the case at bar brings it fully within the

principles thus laid down by the supreme court. But it is not merely that the second mate dismissed the lookout and assumed the discharge of his duties, and that he left his post and was absent during several critical minutes, while there was yet time to avert the disaster, but, by his own showing, he sees a vessel approaching nearly bows on, at the distance of one and a half or two miles; he sees her, as he says, change her course at the distance of one half or three fourths of a mile, and yet, up to the moment of the collision, takes none of the precautions, such as stopping, slowing, blowing his whistle, etc., enjoined by law and dictated by common prudence.

On the contrary, the starboarding (which might have been proper if, as he says, he first saw her green light) is persisted in after the red light became visible, and when there was ample room, by porting his helm, to pass under the stern or on the port side of the schooner, or by stopping and backing to have avoided all possibility of disaster.

The steamer being thus found to be clearly in fault, it remains to consider whether the schooner, by any fault on her part, contributed to the disaster. It is intimated, though not directly charged, by Mr. Douglas, that the cause of the accident was the change by the schooner of her course, so that she ran directly across the bows of the steamer.

This defense is characterized by Mr. J. Grier as "a stereotyped excuse, usually resorted to for the purpose of justifying a careless collision; it is always improbable, and generally false." (23 How. 291.)

The only evidence tending to show that the schooner made the change in her course imputed to her, is the statement of Mr. Douglas, that he first saw her green light alone. To accept this statement, we must disbelieve the evidence of those on board the schooner; we must also reject the inferences which may naturally and safely be drawn from facts which are not fairly open to dispute.

The schooner was beating up the coast against a north north-west wind. She was close hauled to the wind on her port tack. The steamer was coming down the coast, heading nearly south. If, as the second mate testifies, she was

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one point on his starboard bow, the green light would probably not be visible to him—certainly not her green light alone. There is not the slightest reason to suppose that she went about and was put on the other tack. Her helmsman and lookout both testify that she was standing towards the land. The latter had been cautioned by the mate to look out for the shore, and the noise of the steamer's paddles was at first mistaken by both of them for the sound of breakers on the beach. This circumstance, which it is impossible to suppose they have invented, appears conclusively to show that they were in fact on the port tack, heading in-shore, and that the vessel had not gone about so as to present her green or starboard light to the approaching steamer. No necessity or convenience of navigation is suggested which could have induced the schooner, when sailing on the wind, to luff up so as to expose her green light alone to a vessel approaching her from an opposite direction; and I see no reason for discrediting, on the faith of Mr. Douglas' unsupported statement, the positive testimony of those on board of her.

With regard to the weather, the testimony is, as has been observed, conflicting. All agree that the night was cloudy and dark. The claimants' witnesses deny that it was foggy. Two circumstances, however, lead me to the conclusion that in this they are mistaken:

1. The fact, which is uncontradicted, that some time before the accident, the fog-horn was passed by the man at the wheel of the schooner to the lookout, and was blown at short intervals up to the moment of the collision. That at the time of the collision it was sounded and heard on board the steamer is not denied. The weather, therefore, must have been such as to suggest to the crew of the schooner the propriety of its use.

2. A fog did in fact set in after the collision. It was of short duration; but the line which led from the steam whistle forward to the lookout's station, was adjusted, and the whistle was sounded some half a dozen times, a short time after the collision.

This, though it does not prove, makes it probable that

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similar weather prevailed before the collision. The supposition, that owing to the fog the second mate of the steamer failed to observe the schooner until she was close aboard of her, is the more natural, and indeed more charitable, explanation of the occurrence, for it relieves Mr. Douglas of the imputation of gross and almost unaccountable negligence, to which otherwise he would be obnoxious. It does not, however, acquit the steamer; for it was her plain duty to moderate her speed and to blow her steam whistle, both of which precautions she utterly neglected.

A decree will be entered in favor of the libelants, and an order of reference to take proofs as to the damage.

DALLES CITY v. THE MISSIONARY SOCIETY OF THE
M. E. CHURCH. JAS. K. KELLY, AARON E. WAIT,
AND PHOEBE HUMASON v. THE SAME. JAMES K.
KELLY AND AARON E. WAIT v. THE SAME.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 3, 1879.

1. GRANT TO MISSIONS IN OREGON.—The grant to religious societies of mission stations in Oregon, contained in section 1 of the act of August 14, 1848 (9 Stat. 323), is not confined to a single station to each society, but includes as many stations as were then actually occupied by each society for missionary purposes among the Indians.
2. PATENT—SURVEY.—A patent issued under section 2447 of the R. S. upon a survey not approved by the surveyor-general is void; and in case of a grant under section 1 of the act of August 14, 1848, the survey to be approved by the surveyor-general necessarily involves the determination of the question, what is the quantity and boundary of the claim?
3. MISSION STATION.—The grant to religious societies contained in the act aforesaid of the missionary stations occupied by them in Oregon on August 14, 1848, not exceeding six hundred and forty acres, is not confined to the land actually inclosed and cultivated by them, but should be construed to include the maximum quantity at each station occupied by them—that is, claimed and in any way used by them, and not in the actual occupation of any one else.
4. OCCUPATION OF MISSION STATION.—“Occupancy” is a word of narrower signification than possession, and means to possess by laying hold of or

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being actually upon the thing possessed, continuously and exclusively. Prior to August 14, 1848, the title to all lands in Oregon was in the United States, and therefore no person could have constructive possession of any portion thereof, or any possession thereof, or interest therein except actual possession or occupancy, and when this was given up or abandoned, the relation of the party to the land was absolutely terminated.

5. MISSION STATION AT THE DALLAS.—The Missionary Society of the M. E. Church established a mission among the Indians at Wascopum, near the Grand Dalles of the Columbia, in 1838, and in September, 1847, abandoned and transferred the same to Dr. Whitman of the Presbyterian mission at Wailatpu, and never reoccupied the same: *Held*, that the society did not receive a grant of said station under section 1 of the act of August 14, 1848, because it was not at that date in the actual possession and occupation of the premises; that such occupation was a condition precedent to the taking effect of such grant, and therefore it mattered not whether the failure of the society to occupy the station in August, 1848, was voluntary, or was caused by the fear of hostile Indians.
6. PAYMENT BY CONGRESS.—The payment by congress to the missionary society of twenty thousand dollars, in June, 1860, on account of the reservation of three hundred and fifty-three acres of the Dalles mission station in March, 1850, for military purposes and the loss or destruction of property thereon since 1847, by Oregon volunteers, Indians, or United States troops, did not have the effect to invest the society with the title to such station then, or on August 14, 1848; nor was it even an admission that the society had any legal right to the premises, but only that it asserted some kind of a claim thereto which it was deemed expedient to extinguish; nor could congress in June, 1860, by a direct recognition of a supposed prior grant to the society, affect the rights of others already acquired in the premises under the town site and donation acts.

Before DEADY, District Judge.

James K. Kelly and N. H. Gates, for the plaintiffs.

Rufus Mallory and John C. Cartwright, for the defendants.

DEADY, J. These three suits were commenced on September 18, 1877, in the circuit court for the state, in the county of Wasco. The summons was served by publication, and on September 12 the defendant appeared and had them removed to this court, where they were entered on January 30, 1878.

On April 9 there was a demurrer filed to each complaint, which was disallowed, and thereupon, by the direction of the court, on May 2, the plaintiffs in each suit restated

their case in the manner of a formal bill in equity. On August 12 the defendant answered the bills, and on September 20 the plaintiffs filed the general replication. In the course of the proceedings, exceptions for impertinence were taken to both the bills and the answers, which were disallowed, and the questions raised thereby reserved for consideration upon the final hearing.

On October 15, 1879, the causes were heard together upon the several bills, answers, replications, and the exhibits and depositions in each, and in the first one so far as they were applicable to the other two.

Before touching the grounds of the controversy between the parties it may be well to state their respective cases so far as they rest upon either the admitted facts or those established beyond controversy.

The defendant is a corporation formed under the laws of New York, and from 1838 to September, 1847, maintained a mission among the Wascopum Indians on the south bank of the Columbia river, at the lower end of the Grand Dalles thereof, at a place since called The Dalles, in what is now Wasco county; and on July 9, 1875, received a patent from the United States, under section 2447 of the R. S., for a tract of land containing six hundred and forty-three and thirty-seven hundredths acres, including the ground occupied by the improvements made at such mission—less three hundred and fifty acres thereof included in the military reservation—the same being parts of sections 3 and 4 in township 1 north, of range 13 west, and section 33 in township 2 north, of range 13 west of the Wallamet meridian, as a mission station occupied by it on August 14, 1848, within the purview of the second proviso to section 1 of the act of that date, “to establish the territorial government of Oregon” (9 Stat. 313); which provides “that the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes of said territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong.”

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The plaintiffs claim that the defendant did not occupy this tract or any portion of it as a missionary station or otherwise on August 14, 1848, or since September, 1847, and that therefore it was not within the purview of said proviso, and the patent to the defendant was wrongfully issued; and also that they are the owners of and entitled to the patent for certain portions of said tract, as hereinafter stated, and ask to have their several rights therein established and declared, and that the defendant be so far regarded as their trustee and required to convey to them accordingly.

In 1852 the place called The Dalles was occupied as a town site for the purpose of business and trade, and has been so occupied ever since, and in 1855, the county of Wasco caused the same to be surveyed into lots, blocks, and streets, and said survey to be recorded; that on January 26, 1857, the plaintiff, Dalles City, was made a municipal corporation with boundaries including said town site; and on April 18, 1860, entered, at the proper land office, the fractional north-west quarter of said section 3, containing one hundred and twelve acres and including the land so occupied as a town site, under the town-site law of May 23, 1844 (5 Stat. 667; 10 Id. 306), in trust for the several use and benefit of the occupants thereof according to their respective interests, and now claims to be the owner thereof accordingly.

On November 1, 1853, Winsor D. Bigelow became a settler under the donation act upon three hundred and twenty acres of the public land, including parts of the north-west quarter and the south-west half of said section 3, and now known upon the plats of the public surveys as donation claim No. 40, and resided upon and cultivated the same until February 16, 1860, and otherwise complied with the requirements of said act; that on December 9, 1862, said Bigelow conveyed an undivided one-third interest of a certain twenty-seven acres of said donation to the plaintiffs, James K. Kelly and Aaron E. Wait; and on December 12, 1864, conveyed the remaining two thirds of said twenty-seven acres to Orlando Humason, who, on September 8,

1875, died testate, having devised the same to the plaintiff, Phoebe Humason, his widow, which twenty-seven acres said plaintiffs, by reason of the premises, claim to own as tenants in common thereof.

On December 2, 1864, said Bigelow conveyed to said Kelly and Wait forty-six town lots within the limits of his said donation, and situated in what is known as the "Bluff addition to Dalles City," which lots said plaintiffs, by reason of the premises, claim to own as tenants in common thereof.

It is claimed by the defendant that in August, 1847, it agreed to turn over the missionary station at The Dalles, with the improvements thereon, to Dr. Marcus Whitman, the agent of the American board of commissioners for foreign missions, and then engaged as a lay missionary of said board, at a place called Wailatpu, about one hundred and forty miles east-north-east of The Dalles, upon the understanding that said board would maintain a mission there among the Indians, and that said Whitman would pay six hundred dollars for certain personal property belonging to the mission; that in pursuance of said agreement, said Whitman gave the defendant a draft upon said board for said six hundred dollars, and the defendant's agents and missionaries between September 1 and 10, 1847, surrendered the station to said Whitman; that owing to the death of said Whitman on November 29, 1847, said agreement was canceled in 1849, by the surrender of said draft to the agent of said board, and the "retransfer" of said station to the defendant, who thereupon resumed control of the same; that in June, 1850, the agent of the defendant went upon the ground and surveyed and marked the boundaries of the claim as he understood them to be, and that in 1854, the Rev. Thomas H. Pearne, its agent, notified the surveyor-general of the territory of the claim of the defendant thereto; but said defendant substantially admits that from the delivery of said station to Whitman, as aforesaid, it never actually occupied the same for mission purposes or otherwise, and claims that it was prevented from so doing by the danger from Indian hostilities, growing out of what is known as the Cayuse war.

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The commissioner of the general land office authorized the surveyor-general to hear and determine the conflicting claims of the defendant, Bigelow and Dallas City, to the premises, and on February 16, 1860, the parties appeared before him, and on February 2, 1861, said officer decided that the defendant had no right to the land in controversy; which decision, on an appeal to the commissioner, was, on February 7, 1863, affirmed. From there the case was carried by appeal before the secretary of the interior, who, on March 15, 1875, reversed said decision, and decided that the defendant was entitled to the premises as a mission station, and directed a patent to issue to it accordingly.

Section 2447 of the R. S., under which this patent issued to the defendant, is taken from the act of December 22, 1854, authorizing the issue of patents in certain cases, and only applies where there has been a grant by statute without a provision for the issue of a patent. In such a case the section provides that a patent may issue for the grant "upon a survey thereof, approved by the surveyor-general," and "found correct by the commissioner;" subject, however, to the qualification, that "such patent shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land."

The patent in question expressly declares that it is issued to the defendant subject to this qualification. There is, then, no question in this case of the power of this court to investigate the grounds upon which this patent was issued, and to determine that they were insufficient or otherwise, either in law or fact, and decree accordingly. The patent and the subsequent action of the parties has had the effect to remit the case to this forum to try and determine to whom the patent should have issued for the portions of the tract claimed by the plaintiffs.

It is admitted that the plaintiffs are entitled to the patent for the portions claimed by them, unless the defendant was

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entitled to the tract as a mission station under section 1 of the act of August 14, 1848.

On April 30, 1853, the defendant, by its agent, Rev. Thomas H. Pearne, notified the land department of its claim to a mission station near Salem, in Marion county, the same being parts of sections 23 and 26 in township 7 south, of range 3 west, of the Wallamet meridian, and containing ninety-seven and thirty-nine one-hundredths acres, which claim was allowed.

And now the plaintiffs contend that under the act, a religious society can only receive a grant of one mission station, and the defendant having elected to take the station at Salem, is therefore barred from claiming the one at The Dalles.

I do not think this is the most reasonable construction of the statute. It grants the land "occupied as missionary stations" to the several religious societies to which said stations respectively belong. It is true that this language would be satisfied with the grant of one station to each society. But it is broad enough, in my judgment, to cover more, if more there were, and ought to have effect accordingly, unless there is some controlling reason to the contrary in the circumstances of the case. If it had been the intention of congress to limit the grant to one station to each society, such intention would have been more naturally expressed by saying, "the land occupied as a missionary station to each religious society to which such station belongs." And this construction is strengthened rather than otherwise by reference to the surrounding circumstances. For some years prior to the passage of the act of August 14, 1848, there were three religious societies engaged in missionary labors among the Indians in Oregon, the Methodist Episcopal, the Presbyterian, and the Roman Catholic. The first missionaries of the former came to Oregon with Nathaniel Wyeth, in 1834, and established a mission at Wallamet, below Salem, which was afterwards removed to the latter place. Subsequently their numbers were increased, and they established missions at The Dalles, Nesqually, and Clatsop. The Presbyterian missionaries came to the coun-

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try under the auspices of the American Board, in 1836, and established a mission in Wailatpu, near what is now called Walla Walla, with Marcus Whitman at its head. Afterwards they established missions at Lapwai and Spokane—all east of the Cascade mountains. The Roman Catholic missionaries came from Canada with the Hudson Bay train in 1838. They established the mission of St. Paul in the Wallamet, near Champoege, and Cowlitz, on the Cowlitz river. Later they established missions in eastern Oregon, and held occasional missionary services among the Indians at many points in the country. In June, 1848, they established a mission at The Dalles, to the west and adjoining the land in controversy.

The country in which these grants were made was an immense territory, extending from the forty-second to the forty-ninth parallel of north latitude, and reaching from the Rocky mountains to the Pacific ocean. Outside of these missions and the Hudson bay posts, practically, it was unoccupied, except sparsely in the Wallamet valley. The missionaries were very properly regarded as having promoted the settlement and civilization of the country; and there was no reason why, if congress saw proper to recognize their services, either as settlers or missionaries, by granting them the land occupied by them as mission stations, it should confine the grant to one station to each society when more were occupied by it.

It is also insisted that this patent is void, as not having been issued upon "a plat of survey thereof," approved by the surveyor-general, but upon the survey made by the agent of the mission, in June, 1850. I think it is plain that a patent issued upon a survey or diagram not approved by the surveyor-general would be void. For instance, a patent could not lawfully issue upon the survey of the claim by the society itself, because a survey of the grant involved the question of how much land was occupied by the mission, and within what limits. To allow the society to do this, would be to make it a judge in its own case.

The grant was only of the land occupied, which might be less than six hundred and forty acres, and the surveyor-

general was required to ascertain the quantity and its boundaries before he could approve a survey thereof to enable the department to issue a patent therefor.

When the surveyor-general was authorized to hear the contest between these parties, on February 23, 1860, he directed a deputy surveyor to make a survey of the premises: 1. As claimed by the society; 2. As actually occupied by it; and, 3. So as to include its improvements, with six hundred and forty acres south of the bluff, in substantially a square form. Plats of these surveys—the second one containing eighty-seven acres—were forwarded to the commissioner by the surveyor-general with his decision that the society was not entitled to any portion of the premises as a missionary station. Neither of these “plats of survey” were approved by the surveyor-general in the sense of the statute, because they were each made upon a hypothesis—that the society occupied the premises, or some portion of them, as a mission station on August 14, 1848—which he at the same time found not to be true.

But on March 29, 1875, and after the decision of the secretary of the interior, the commissioner wrote to the surveyor-general advising him of such decision, and directing him to furnish that office with a “certified diagram of the claim of said society” as confirmed by the same. In obedience to this direction, the surveyor-general, on June 17, 1875, certified to the commissioner a diagram of the first of the three surveys, as being a plat of the survey of the Methodist mission claim at The Dalles, and upon this the patent was issued, as appears therefrom.

Whatever, then, may be thought of the correctness of the survey, the proposition that the patent was issued without a plat of survey approved by the surveyor-general, in the face of these facts, is not tenable.

It is also contended by the plaintiffs, that if the defendant is entitled to take under the act as a missionary society at all, the grant should be confined to the land actually occupied by it.

This grant, unlike the one made by the donation act, is not of the six hundred and forty acres occupied by the donee,

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but of the quantity occupied, not exceeding that number of acres. Still, it could not have been the intention of congress in the one case more than the other that the occupation of a donee should be limited to his actual inclosure and tillage. The donation act of September 27, 1850 (9 Stat. 497), was in this respect a sort of supplement to the act of August 14, 1848, and did for the settlers at large what the former had done for the missionaries. It gave to the settler then residing in the territory, for himself and wife, the section of land which he had resided upon and cultivated for four consecutive years. But this residence and cultivation was not required to include the whole section. In fact, the actual inclosure and cultivation was often confined to a very few acres; while the remaining portion was only occupied for grazing, and sometimes hardly that.

Very early in the settlement of this country it became a cardinal rule that a settlement on the public lands should not include any more than a section. This was probably suggested by the terms of the Oregon bill introduced into the senate by Dr. Linn, of Missouri, in 1842, which, among other things, proposed to give six hundred and forty acres of land to each white male inhabitant of the territory over eighteen years of age. Prior to this time the missionaries had claimed large areas at their several stations, but as generally there was no one to dispute such claim, it mattered little one way or the other. In December, 1843, the mission at Salem was surveyed and platted at sixteen sections. But on July 5, 1843, the people adopted a land law which limited the extent of a claim or settlement to six hundred and forty acres, with a proviso, that any mission "of religious character" established before that time might contain six miles square. (Or. Laws, 1874, p. 50, n.)

Under these circumstances I think the grant to the missionary societies ought to be construed to include six hundred and forty acres at each mission station occupied by them; that is, claimed and used by them according to the circumstances of the time and place, and not in the actual occupation of any one else.

In the case under consideration there does not appear to

have been any survey or marking on the ground of the boundaries or limits of the claim, until June, 1850. But it was doubtless well understood by the occupants and the Indians, that it should extend a certain distance in certain directions, or that it should include certain points or places, as the improvements, the mill-site, etc.; though I do not think that it was ever expected or intended that it should extend north of the bluff, between which and the river, a distance of about half a mile, were the villages and camping-ground of the Indians and voyagers up and down the Columbia river.

And this brings me to the consideration of the question, whether, upon the evidence, the defendant occupied this mission station so as to be entitled to the grant thereof under the act of August 14, 1848.

The evidence is somewhat meager, and upon some points contradictory. It consists largely of the testimony of persons deeply in sympathy with the defendant, to facts and circumstances occurring thirty years ago, and scattered over a considerable period of time. The correspondence between the defendant and its agents here concerning the occupation and transfer of this station is not produced. It is presumed to have been in writing, and within the knowledge and control of the defendant, and therefore the omission to produce it is a matter which must have more or less weight against the defendant, according to the circumstances of the case. Portions of the evidence partake of the character of hearsay, and some of it is decidedly argumentative. In considering it, it will be impossible to ignore the history of the period and place to which it relates. Reading it, then, by this light, and, where it is contradictory or obscure, supplementing it from this source, the material facts about the settlement and occupation of the mission station at The Dalles are these:

In the spring of 1838, the Rev. Daniel Lee and Rev. H. K. W. Perkins, under the direction of the Rev. Jason Lee, the superintendent of the defendant in Oregon, established a mission within the limits of the tract described in the patent herein, at a place then called Wascopum. In the fall

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of the same year it was stocked with cattle from the Wallamet valley. The place was favorably situated for trade and intercourse with the Indians and immigrants from the east—the latter usually at this point exchanging their wagons for boats, and often bartering their poor oxen for supplies, such as fresh beef and the like.

In 1840, Mr. H. B. Brewer went to reside there as a farmer for the mission. Perkins and Lee left the mission for the east in 1844, and the Rev. A. F. Waller joined it about the same time. Waller and Brewer remained there until the transfer of the station to Whitman in 1847. In 1844, the Rev. George Gary superseded Jason Lee as superintendent of the Oregon mission. Apparently the society had become dissatisfied with the secular character and cost of the missionary operations, and sent Gary here to bring about a change in this respect. To this end, soon after his arrival in the territory, the various mission stations, except The Dalles, and all the mission property, consisting mainly of large herds of horses and cattle, were disposed of to members of the mission; so that after 1844, the defendant had no "mission among the Indian tribes" in Oregon except at The Dalles. Thereafter, the labors of its faithful clerical missionaries, of whom but a few remained in the country, were devoted to the growing "white settlements" in the Wallamet valley. In the language of one of them: "The finances of the Oregon mission were thus summarily brought to a close, and the mission was not only relieved of a ponderous load, but assumed a decidedly spiritual character." (Hines' Oregon, 242.)

In July, 1847, Mr. Gary was succeeded as superintendent of the mission by the Rev. William Roberts. Prior to this, and in the spring of that year, Mr. Gary had disposed of nearly all the live stock of The Dalles mission station, and was negotiating with Dr. Whitman for the transfer of the station itself. Mr. Roberts, in continuation of the policy manifested by his predecessor, followed up these negotiations until, in August, an agreement was made for the abandonment or transfer of the station to Whitman, together with the sale of a canoe, some farming utensils, grain, and

household furniture, for the sum of six hundred dollars; and between September 1 and 10, 1847, Messrs. Waller and Brewer, the agents of the defendant, delivered the possession of the premises to Whitman, who took actual possession thereof and placed his nephew, Perrin B. Whitman, a youth of seventeen years, in charge, while he proceeded to his mission station at Wailatpu.

Dr. Whitman was not a minister, but at the time of the transfer of this station to him it was understood and expected that religious services and instruction would in some way be kept up there for the benefit of the Indians; but there was no legal obligation to that effect; nor did the defendant or its agents have any intention or expectation of returning or occupying the station if such services and instruction were not furnished, or otherwise. In pursuance of the settled policy of the defendant, the station was absolutely and unqualifiedly abandoned to Dr. Whitman, without any reservation or right to resume the possession under any circumstances.

Dr. Whitman, whatever his purpose may have been in regard to the Indians, purchased the station primarily for himself and nephew, Perrin B., to whom he promised the west half of it, if he would remain and take care of it until the spring, when the former intended to return there and make it his permanent home.

At the time the defendant abandoned this station, there were about seventy acres under some kind of inclosure, about one half of which had been under cultivation. There were six moderate-sized buildings upon the premises—a dwelling, meeting, school, and store-house, barn and workshop, built of logs, except the dwelling, which was a frame filled in with adobe. The buildings were plain, and constructed mostly with Indian labor, and did not cost to exceed four thousand dollars, at which valuation they were afterwards, on June 16, 1860, paid for by the United States upon the claim and estimate of the defendant to that effect. (See H. of R., Rep. No. 145, 2^d Ses. 35 Cong.; 12 Stat. 44.)

On November 29, 1847, Dr. Whitman and others were

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murdered at Wailatpu, by the Indians of that station, and this was followed by what is known as the Cayuse war, in which the people of Oregon, under the provisional government, undertook to chastise the Cayuse Indians for this massacre. By midsummer of 1848, hostilities had ceased, and peace was established; and in the latter part of the summer the troops were withdrawn from the country, and returned to their homes.

About December 16, Perrin B. Whitman, who had remained in charge of the station at The Dalles, being apprehensive of danger, left for the Wallamet valley, taking with him Mr. Alanson Hinman, whom his uncle had sent there from Wailatpu in October as a farmer and house-keeper. A detachment of volunteers soon after occupied the premises with the permission of said Whitman, and it remained in the possession of the troops of the provisional government until they were withdrawn from the country as stated. Thereafter the premises remained unoccupied, except occasionally by passing travelers and immigrants, until the spring of 1850, when a military post was established there by the United States, and the premises included in a military reserve.

There never were any Indian hostilities at The Dalles of a general or serious nature, or within one hundred miles of the place. The immigrants of 1848 and 1849 came through the country without molestation; and from early in 1848 there was no more danger of Indian difficulties or hostilities at The Dalles than there was prior to September, 1847.

In the spring of 1849, the news of the passage of the organic act, with the clause making a grant to missions, reached Oregon. The death of Whitman had prevented the occupation of the station at The Dalles by him, either for himself or as the agent of the American Board, or both. The draft of six hundred dollars, which he had given upon the board in payment for it, had never been presented. Whatever might be thought of the claim of the defendant, there could be no ground for claiming the premises as a place ever occupied by the American Board as a mission

station. Thereupon, about the last of February or first of March, 1849, an arrangement was made between the superintendent of the Oregon mission, and Messrs. Elkanah Walker, Henry H. Spaulding, and Cushing Eells, three missionaries of the American Board, by which the station was retransferred to the defendant and the draft aforesaid canceled; and this was done by the defendant, not with any view of resuming missionary work there among the Indians or otherwise, but solely to enable it to claim and obtain, if it could, a grant of the premises from the United States on account of its occupation prior to September, 1847, and the subsequent circumstances. To the same end, and to assist it in obtaining damages from the United States for taking a portion of the station as a military reservation, the defendant, on February 28, 1859, obtained from the American board a formal deed of quitclaim to the premises; although on November 3, 1858, Messrs. Walker and Eells, professing to act upon a power to them from said board, dated February 28, 1852, for a nominal consideration, had conveyed the premises, subject to the military reservation, to Messrs. M. M. McCarver and Samuel L. White.

Upon this state of facts there is no ground to claim that the defendant acquired the title to this station on August 14, 1848, under the act of that date. It had abandoned the place voluntarily, and without any expectation or intention of returning, and was no more within the purview or operation of the act than if it had never been upon the ground. The grant only applies to such stations as were occupied on August 14, 1848. To occupy is to possess, not constructively, but actually. The word is of more limited signification than possession. It is derived from *ob* and *cipio*, to lay hold of, and means to possess by having hold of or being actually upon the thing possessed—continuously and exclusively. Therefore, there can be no such thing as constructive occupancy. But when one has the complete legal title to land and is therefore entitled to the possession of the same in law, he is deemed to have it. (*U. S. v. Arredondo*, 6 Pet. 743.) But prior to August 14, 1848, there could be no such possession of

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lands in Oregon, because the legal title was in the United States. Occupancy or actual possession was the only interest any one then had in lands in Oregon, and when that was given up or abandoned the relation of the party to the land was absolutely terminated, and it was open to occupation by the next comer as though the foot of man had never been upon it. (*Lounsedale v. City of Portland*, 1 Deady, 1.)

Prior to August 14, 1848, the only interest which the defendant had in the premises was that of occupancy or actual possession. It therefore could have no constructive possession of the land. If this actual possession or occupancy existed at the passage of the act making the grant, the title of the United States was then and thereby, and on that account, vested in the defendant, but not otherwise. The act makes the grant to take effect, not upon an occupation which preceded or followed it, but upon that which was contemporaneous with it. The grant was made upon the condition precedent, that the defendant was then in the occupation of the premises. Intention or desire to occupy is of no avail; and for the want of this occupation there is no excuse or equivalent. Even taking the view of the matter sought to be maintained by the defendant, that it was prevented from occupying the premises on August 14, 1848, by Indian hostilities, still the case clearly falls within the ruling in *Ford v. Kennedy*, 1 Or. 166, in which it was held that the grant in section 4 of the donation act of six hundred and forty acres of land to married persons who had resided upon the same for four years prior thereto, or to their heirs in case of their death before the patent issued, did not include the heirs of married persons who had died before the passage of the act, because, by the terms thereof, the grant was limited to persons residing in the territory at the time of its passage, then in being.

So in this case the grant only applies to stations then occupied for missionary purposes, and if for any reason a station was not then so occupied, it is not within the purview of the act, it matters not how long or how effectively missionary operations had been carried on there at some

former period. The station at Wallatpu would in all probability have been occupied by the Presbyterian society on August 14, 1848, but for the massacre of the missionaries there on November 29, 1847. But this fact did not excuse or was not equivalent to such occupation. Therefore, in the passage of the act to organize Washington territory, passed March 2, 1853, when congress had this subject before them with reference to the missionary stations in the proposed territory, the grant was repeated in the terms of the Oregon act, with the addition of the words, "or that may have been so occupied at missionary stations prior to the passage of the act establishing the territorial government of Oregon." This change was manifestly made to meet the case of the Wallatpu mission, which was not occupied as a mission station on August 14, 1848, and upon the theory that for want of such occupancy it was not granted by the Oregon act to the society which Dr. Whitman represented during his residence upon it, prior and up to the time of his death. But such want of occupancy, being neither the result of a voluntary abandonment nor a fleeing like the hireling from the wolf, but of the death of the faithful occupant at his post by Indian treachery and violence, congress was induced to extend the terms of the grant so as to include that case.

But, as has been shown, there is not the slightest ground for saying that The Dalles station was abandoned by the defendant's missionaries on account of fear of the Indians, or that such cause prevented its occupation by them in August, 1848. On the contrary, they deliberately abandoned it without any intention of returning, because of a change of policy on the part of the society; and if the act of 1848 had not contained the clause making the grants of mission stations as it did, it is morally certain that we would never have heard of this manifest afterthought, that Whitman was to keep up the missionary work at The Dalles, in some sense as the representative of and for the defendant, and that upon his death the station would have been reoccupied and held by it as a mission but for fear of the Indians.

But it is urged that congress has recognized the validity

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of the defendant's claim to this land by the passage of the act of June 16, 1860 (12 Stat. 44), "for the relief of the missionary society of the Methodist Episcopal church," which provided that there should be paid to said society "the sum of twenty thousand dollars, upon filing in the proper department a release to the United States, to be approved by the attorney-general, of all claim to the land embraced within the limits of the military reservation at The Dalles, in Oregon territory, and of all claim for damages for destruction of property on or near the said land by the United States troops, or volunteers, or Indians at any time anterior to the date of said release."

To fully comprehend the motive and scope of the act, it is necessary to state, that in 1854, the military reservation at The Dalles, which had covered a number of square miles, was, by an order from the war department, reduced to six hundred and forty acres, to be laid off in such a manner as least to interfere with private rights. In the execution of this order only three hundred and fifty-three acres of the mission station, as surveyed in 1850, by the defendant, including all the improvements thereon, were embraced in the reservation. The society availed itself of this circumstance, and at once asked for compensation. The matter was referred by the department to Major G. J. Raines, then the post commander at The Dalles, who reported in favor of paying the society the sum of twenty thousand dollars. On January 28, 1859, the house committee on military affairs also recommended such payment, which was to be in full satisfaction of the claim for the land, and also one for four thousand dollars for the destruction of property upon the claim. The committee state in their report that it appears from the evidence that the society was in the "possession" of the land on August 14, 1848, and that as soon as the danger from Indian hostilities admitted, it endeavored to "reoccupy" the premises, but the United States "troops had ere then taken possession" and included them in the military reservation.

The committee seem to have avoided saying that the society was in the occupation of the premises on August 14,

1848, but chose the more indefinite and convenient term "possession." In passing the bill, however, congress made no declaration on the subject.

This is one of the matters alleged in the answer, which was excepted to as impertinent.

So far as these suits are concerned, it only amounts to this: upon the *ex parte* representations of the defendant, congress was induced to pay twenty thousand dollars in satisfaction of its claim for one half of the premises, and the value of the improvements thereon, whether destroyed by the volunteers under the provisional government, the Indians, or the United States troops, and estimated by it at four thousand dollars.

As has been stated, no reasons were given by congress for the passage of the act; but, in fact, various ones may have, and probably did, influence the action of members in favor of the appropriation.

Probably the strongest consideration in its favor was the fact, that, although the defendant might not have been in the occupation of the station in August, 1848, still it had maintained a mission there for nine years prior to September, 1847, during a portion of which time the title to the country was in dispute, and therefore there was a strong equity in favor of its receiving some compensation, in either land or money. Again, the very fact that the defendant is the representative of a popular and powerful religious organization, for whose good-will and favor the average congressman in Oregon and elsewhere has a lively regard, may not have been without its effect on the result.

But be this as it may, the action of congress in making provision for the payment of this claim, can not, under the circumstances, have the effect to invest the defendant with the title to the premises. In legal effect, all that was done amounted only to a release by the defendant of its right, if any, to the one half of the claim occupied by the military, and for damages for the loss or destruction of property, which is not even an admission by the United States to whom the release was made, that the releasor, the defendant, ever had any right to either, but only that it asserted

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some kind of claim thereto which it was deemed expedient to satisfy and extinguish. (*Bright v. Rochester*, 7 Wheat. 548; *Watkins v. Holman*, 16 Pet. 25; *Croxall v. Shererd*, 5 Wall. 287; *Merryman v. Bourne*, 9 Id. 600.)

Besides this, one of the plaintiffs, and Bigelow, under whom the others claim, had already acquired rights in the premises under the town site and donation acts, which congress could not deprive them of, even if they had been parties to this proceeding which resulted in the payment to the defendant. Congress has the power to dispose of the public lands and to make compensation for private property taken for public uses, but it has not judicial power, and therefore can not finally determine conflicting claims to land, although arising under its own grants or laws.

But since this payment to the defendant, of twenty thousand dollars, there is no longer any cause for regarding it as even morally entitled to anything from the public on account of its missionary operations at The Dalles. In 1847, when the place was abandoned by the defendant, it had no market value, because, there being no white people east of the Cascade mountains, except a few Presbyterian and Roman Catholic missionaries, there were no other purchasers for it; and rather than let it fall into the hands of the latter it was disposed of to Doctor Whitman for six hundred dollars. And it appears that he was induced to make the purchase even at that figure, as much to prevent the "priests" from getting hold of the position as anything else. In 1850, when the claim was taken by the military, it probably could not have been sold with a good title for one thousand dollars; and even as late as 1854-55, when the town had commenced to grow, the sum paid the defendant by the United States for the one half of it, was probably more than double the value of the whole of it.

The conclusion of the court is, that defendant did not occupy the premises on August 14, 1848, as a missionary station or otherwise, either by himself or the American Board, and that it was not deterred from so doing by the danger from Indian hostilities, but voluntarily abandoned the same before September 10, 1847, without any intention or expect-

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tation of reoccupying it under any circumstances, and therefore the patent therefor to the defendant was wrongfully issued; and the decree of the court will be that the defendant be declared a trustee for the several plaintiffs herein, for so much of the premises described in the patent as is claimed by them in their several suits, and that the defendant, within ninety days, by a sufficient conveyance or conveyances, containing proper covenants against its own acts, to be approved by the master of this court, release to the said plaintiffs accordingly all right and title to said premises, and that it pay the plaintiffs their cost and expenses of suit.

THE BOBOLINK.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 9, 1879.

CARRIER'S LIABILITY—GOODS DAMAGED BY SEA PERILS.—Where wool arrived damaged, and in a perishing condition, from causes for which the carrier was not responsible, and the consignees declined to receive it, and it was subsequently sold by the carrier to prevent its perishing on his hands: *Held*, that the carrier's duty and liability terminated on the discharge of the wool, and reasonable notice and opportunity given to the consignees to take it away. He thenceforth became a compulsory bailee of the goods, bound only to such reasonable care as a prudent and honest man would take of property of which he has become the involuntary custodian.

Before HOFFMAN, District Judge.

Taylor & Haight, for libelants.*James C. Perkins*, proctor for claimants.

HOFFMAN, J. I see no ground on which the libel in this case can be supported. The wool in question was shipped "to be carried on deck at the owner's risk." It was injured during the voyage by reason of its exposed situation, and by one of the perils of which the shipper took the risk. The stowage was as careful and safe as under the circum-

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stances was practicable. The vessel on her arrival was hauled into a slip, and the discharge commenced and prosecuted with reasonable and customary diligence. The wool was discharged on Thursday afternoon, and the libelants were notified of the fact on the next morning. They were already aware of the vessel's arrival, but had neither presented their bill of lading, tendered the freight, nor demanded their goods. They seem to have been notified as soon as in the usual course of business was practicable, and as soon as the fact was known that the marks on the packages ("M. & F.") indicated that they were the consignees. They refused to receive the wool, on the ground that the liability to them of the insurers was in dispute. As the wool was rapidly deteriorating in value, the agents of the vessel became alarmed lest it should utterly perish on their hands. They therefore endeavored to have it scoured, which it seems was indispensable to arrest the destructive processes which were going on. They found great reluctance on the part of persons engaged in the business of scouring, to undertake the operation, and a price was asked which seemed to the expert whom they employed to be exorbitant. The latter, therefore, concluded to accept an offer to purchase it from a party who owned a scouring mill. This disposition of the wool was made in perfect good faith, and under the conviction that it was the most advantageous arrangement that could be made for the interest of all concerned. The sale was made on Saturday. To save the wool, it was necessary to keep steam up in the mill during Saturday night and Sunday, and to employ workmen at extra wages to conduct the operation. Its condition admitted, or was supposed to admit, of no delay. Had it been left unattended to until the succeeding Monday or Tuesday, its value would have been greatly impaired, perhaps wholly destroyed.

The ship's agents make no pretension to be experts in the wool business. Their duties and liability as carriers terminated on the discharge of the wool, and reasonable notice of the fact and opportunity to take it away given to the consignees. From that moment they became compulsory bailees of the goods. Not at liberty, of course, to let them

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perish by their negligence, but only bound to take reasonable care, such as a prudent and honest man would take of property of which he has involuntarily become the custodian.

I am by no means sure that under the circumstances, they were bound to incur the trouble and expense of resorting to extraordinary methods to arrest the progress of the damage caused by a sea peril for which they were not responsible. Whether this be so or not, they acted to the best of their judgment and in good faith. The price they obtained was the full value of the wool in its then condition. They are willing to pay, and have offered to the libelants, the amount received by them, less freight and other charges. They have thus discharged their whole duty under the law.

JOHN BEAR v. H. H. LUSE.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 10, 1879.

1. TOWN SITE.—The occupation of a tract of land as a town site for the purposes of business or trade, which is afterwards abandoned, does not impress upon the locality the character or quality of a town site, so that the same can not be taken up and held under the donation act as unoccupied public land.
2. SUIT TO AFFECT A PATENT.—Equity does not have jurisdiction to affect a patent except upon the ground of an antecedent equity in the plaintiff which was disregarded in the issuing thereof, and therefore a party who claims to have settled upon a tract of public land subsequent to the settlement and entry thereof by another who has received the patent for the same, upon the ground that the settlement and entry of the patentee were illegal and void, can not maintain a suit to set aside such patent or charge the patentee as his trustee of the premises.
3. QUESTIONS OF FACT—DECISIONS OF THE LAND DEPARTMENT.—Questions of fact decided in the land department are not subject to review by the courts, except for fraud or mistake other than an error of judgment; and where there is a contest in such department between one who claims to be a settler upon a portion of the public land, to cancel the entry of a prior settler upon the same land, the decision therein precludes further inquiry by the parties into any question of fact which might properly have been made in such contest, the same as if it had been actually so made and considered.

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4. SAME—QUESTION OF LAW.—Whether a settler under the donation act upon unsurveyed lands could commute his residence thereon, under section 1 of the acts of February 14, 1853, and July 17, 1854, by the payment of one dollar and twenty-five cents an acre therefor, is a question of law, and therefore the decision of the land department thereon may be reviewed by this court upon the suit of a party having an equity in the premises prior to such entry, but not otherwise, except in a suit by the United States to cancel the patent issued upon such entry.

Before Mr. JUSTICE FIELD, and DEADY, District Judge.

Walter W. Thayer and William G. Webster, for the plaintiff.

John Burnett and R. R. Strahan, for the defendant.

By the Court, DEADY, J. In the spring of 1877, H. H. Luse commenced actions at law in the circuit court for the county of Coos against a number of persons to recover the possession of certain lots in the town of Marshfield, in said county, the same being parts of lots 3 and 4 of section 26, in township 25 south, of range 13 west of the Wallamet meridian.

Each of the defendants in these actions filed a complaint in equity in the nature of a cross bill, under section 377 of the Or. Civ. Code, against Luse to stay the proceedings therein, and praying that he be enjoined from "asserting any right or title to the premises" or "interfering with the plaintiffs in occupying and holding" the same.

Under said section 377, the effect of this was to stay the proceedings in the actions at law until the final disposition of the suits in equity.

On account of the disability of the judge, the cases were removed by stipulation to the circuit court for the county of Marion. In November, 1878, they were removed by Luse to this court, upon the grounds that he was a citizen of California, and that the controversy therein arises under the donation and town-site acts of the United States, and were entered here on January 6, 1879.

By stipulation, the evidence taken in this case was to be considered as taken in the others; and on August 21 it was argued and submitted, upon the understanding that the final determination therein should be followed in the other cases.

The material facts in the case are as follows:

On March 24, 1877, the land office at Roseburg issued a patent certificate, No. 1961, in favor of Wilkins Warwick, for a donation of one hundred and sixty acres, under the donation act of September 27, 1850 (9 Stat. 497), upon a residence thereon from August 4, 1854, to March 10, 1856, and the payment on September 16, 1856, of one dollar and twenty-five cents per acre, under the acts of February 14, 1853 (10 Id. 158), and of July 13, 1854 (Id. 306), amendatory of said donation act, in lieu of the remainder of the four years' residence thereby required, the same being lots 3 and 4 of section 26, the north one half of the south-east one quarter of section 27, all in township 25 south, of range 13 west of the Wallamet meridian; upon which certificate a patent for said premises was, on May 6, 1876, issued to said Warwick, and the defendant, Luse, on and before the commencement of said actions at law, had, by means of sufficient conveyances, acquired all the interest of said Warwick in the premises. In 1869, proceedings were instituted in the local land office in the interest of the inhabitants of Marshfield, and with a view of entering the same for their benefit as a town site, to cancel and set aside Warwick's notification and entry upon the charge of "abandonment." The ground of this charge was, that the commutation entry of September 16, 1856, was void, the land being then unsurveyed, and therefore the failure to reside thereon, thenceforth, amounted to an abandonment.

That office and the commissioner of the general land office decided the question against Warwick, holding that section 1 of the act of February 14, 1853, and of July 17, 1854, providing for the payment of one dollar and twenty-five cents per acre in lieu of the last three years' residence upon the donation required by the act of September 27, 1850, did not apply to unsurveyed lands. Upon an appeal to the secretary of the interior, that officer, on May 29, 1874, reversed such decision, saying: "The language (of said section 1) is somewhat ambiguous, but it is undoubtedly susceptible of a construction to include unsurveyed land, and such a construction seems to be in strict conformity

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with the spirit of the act and the objects intended to be accomplished by its passage. The construction adopted is extremely technical, and I think contrary to the policy of the act, which was a benevolent statute, and as such had received, in all adjudicated cases arising under it, an exceptionally liberal interpretation. (*Stark v. Starr*, 6 Wall. 402; *Silver v. Ladd*, 7 Id. 219.)"

The secretary also held that the entry of Warwick being, *prima facie*, regular and valid, the contestants, who had neither alleged nor claimed any prior interest in the land, could not maintain a proceeding to set it aside.

The present suit is sought to be maintained not only upon the ground passed upon in the land department, namely, the abandonment by Warwick of his residence upon the premises before he had complied with the requirements of the law, but also upon the ground that the premises included in the patent to Warwick are a part of the town site of Marshfield, which "was settled upon for the purposes of business and trade, and not agriculture, long prior to the date of the pretended settlement or occupation by Warwick," and that, relying upon this fact, the plaintiff settled upon the lot in controversy, expecting "that title thereto would be duly obtained in accordance" with the laws of the United States.

Briefly, it appears from the evidence that in March, 1854, Mr. J. C. Tolman, now surveyor-general of this state, went upon the ground with his family, and marked out a claim of three hundred and twenty acres, to which he gave the name of Marshfield, and built a double log house thereon, with the intention of acquiring the same as a donation under the act of September 27, 1850, and building a town thereon. About August 1, Tolman removed to Jackson county, where he settled upon three hundred and twenty acres of the public land and acquired the title to the same under the donation act, and never returned to Coos county. When he left he made an arrangement with one A. J. Davis to hold the claim thereafter together, Davis procuring Warwick to hold the north end of the claim for him, and one A. J. Gaskill the south end for Tolman.

Just prior to leaving, Tolman gave Captains Crosby and Williams, who were in the bay with a vessel, two lots, on the marsh near the water, on condition that they would build a store and warehouse thereon, and occupy the same as a place of business. During the summer they caused a small frame house to be erected there, but never occupied it or returned to the place. On August 4, 1854, Warwick went into the log house built by Tolman, and resided there for over a year, claiming to be a settler under the donation act, during which time, on March 10, 1856, he filed a notification under the donation act for one hundred and sixty acres, including such dwelling-house, and on September 16, 1856, per said Davis, made proof of such residence and cultivation, and entered the same at one dollar and twenty-five cents per acre, under the donation act and section 1 of the acts of February 14, 1853, and July 17, 1854. In the fall of 1856, Warwick and Davis left the country, and have not returned to it, and at the same time, James T. Jordan, by the permission of Davis, occupied the house built by Crosby and Williams as a store. Davis gave Jordan instructions to look after the claim and pay the taxes on it, which he did for about five years, when Luse assumed an oversight of the place as the agent of Davis and within a year thereafter as the owner of the same.

On June 10, 1855, Tolman sold his supposed interest in the Marshfield claim to J. S. Hatch, who soon after took George C. Furber into the speculation as a partner. In the fall of 1856, Socrates Schofield, under the direction of said Hatch, Furber, and Davis, laid off a village upon the claim taken up by Tolman, the smaller portion of which was upon the tract patented to Warwick, and made plats thereof, which was the first attempt to lay off a town upon the premises.

The first house built upon the Marshfield claim after the two built in 1854, was built in 1857, and occupied as a dwelling-house by a man named Hamilton. The next house was a saloon, built in 1866, and now occupied by the plaintiff. Soon after this, in 1866-67, a saw-mill was built at Marshfield, and people commenced to occupy the place as a town; and at the commencement of these actions at law

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there were from fifty to seventy-five houses on the portion included in Warwick's donation.

On October 24, 1874, the town of Marshfield was duly incorporated, with the following boundaries: "Commencing at a point on the ship channel of Isthmus slough, ten chains north of the south-east corner of lot 2 in section 26 of township 25 south, of range 13 west; thence west to the east line of section 27 of said township; thence north along said line forty chains; thence east to the inside channel of Coos bay; and thence southerly along said channel to the place of beginning." (Ses. Laws, 162.) These boundaries include the lots involved in this litigation.

In November, 1873, and before the incorporation of said town, an application was made by G. Webster, acting on behalf of the inhabitants of the place, to enter land as a town site, including a portion of the Warwick donation. The contest to cancel Warwick's entry being then pending in the land department at Washington, the application and money were merely received by the officers as a deposit to await the result of such contest, and were returned to Webster in the same month. On February 19, 1877, the trustees of the town of Marshfield applied at the land office to make the same entry, but the application was rejected on the ground that it was not open to entry.

Upon this state of facts this suit can not be maintained. The place called Marshfield was not, as a matter of fact, occupied as a town site or settled upon for the purpose of business or trade prior to the survey of the same into lots and blocks in the fall of 1856, and probably not until 1866, and never within the meaning of the town site act of May 23, 1844 (5 Stat. 657), and section 1 of the act of July 17, 1854 (10 Id. 305).

The act of July 17, 1854, *supra*, first extended the town-site act of May 23, 1844, over Oregon, and they are so far in *pari materia*, and therefore should be construed as one. Taken together, they provide that thereafter a donation claim shall not be surveyed so as to include lands settled upon and occupied as a town site.

But this settlement and occupation must have taken place

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before the settlement under the donation act, and not been given up or abandoned. If any number of people had settled upon the Marshfield claim in 1854, as a town site, for the purposes of business or trade, and thereafter and before the entry of the same, had left the place—abandoned it—the land would not thereby have had the character or quality of a town site indelibly impressed upon it, so that it could not afterwards be taken and held under the donation act. On the contrary, so soon as it was not occupied as a town site it was abandoned, and was open to settlement under the donation act as though it had never been occupied for any purpose. (*Lounsedale v. Portland*, 1 Deady, 14.) Mr. Tolman's interest in the land as a town site, or otherwise, ceased with his occupation of it on August 1, 1854, and the next comer took it unaffected by the fact or purpose of such occupation. The agreements by which it was attempted to prolong his interest in the claim after he ceased to occupy it through the occupancy of others were clearly illegal and could not affect the rights of any one. (Donation act, sec. 12.)

When Warwick's settlement commenced upon the Marshfield claim, August 4, 1854, it was vacant land. There was no one else living upon or claiming it, and it was clearly open to settlement under the donation act; and if any number of people settled on it thereafter for the purposes of business or trade, that did not make the place a town site within the meaning of the statute; but such persons were either trespassers or occupants under the owner, Warwick. A settler under the donation act has the legal estate in his donation from the date of his settlement, and no number of people can deprive him of it by occupying it as a town site or otherwise. (*Chapman v. School District*, 1 Deady, 113; *Fields v. Squires*, Id. 378; *Mizner v. Vaughn*, 2 Saw. 272; *Adams v. Burke*, 3 Id. 418.)

But it is alleged, and there is evidence tending to prove the allegation, that Warwick's settlement under the donation act was fraudulent and void because not made for himself, but for Davis or Tolman. But the plaintiff is not in a condition to question the legality of Warwick's settlement

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and occupation, and the patent to him thereon. Equity does not have jurisdiction to affect or set aside a patent, or to hold the patentee as a trustee for another, except upon the ground of an antecedent equity in the plaintiff, which was disregarded or overlooked in the issuing of such patent. (*Stark v. Starrs*, 6 Wall. 410; *Frisbie v. Whitney*, 9 Id. 196.)

The interest of the plaintiff, if any, is subsequent to the settlement, occupation, proof, and entry of Warwick. *Prima facie*, the premises had become the property of Warwick before the plaintiff's occupation began. The legality of Warwick's settlement and occupation was then exclusively a question between him and the United States; and until such entry was canceled by the latter, neither the inhabitants of Marshfield, nor any one for them, was entitled to enter the land as a town site. Rightfully or wrongfully, the land had been granted to another before there were any occupants of lots in Marshfield other than the donee thereof. The plaintiff is, therefore, without any established interest in or right to the premises, and therefore has no standing in a court of equity to question the legality of the patent to Warwick or the sufficiency of the grounds upon which it issued.

But a contest was had in the land department between the inhabitants of Marshfield and Warwick upon the question of the validity of his entry, which was decided in favor of the latter.

In that contest, the only objection made to the donation entry was that, being upon unsurveyed lands, the settler was not entitled to commute the required residence thereon by paying for the land at the end of one year's residence, at the rate of one dollar and twenty-five cents per acre. And that question being one of law merely, depending for its solution upon the proper construction of section 1, of the act of February 14, 1853, which provides that settlers under the donation act, "who have located or may hereafter locate" public land, "of which survey shall have been made or may hereafter be had," shall, after one year's occupation, in lieu of the residence required by that act, be permitted to pay

“one dollar and twenty-five cents per acre for the lands so claimed, located, and surveyed as aforesaid,” this court might now, if the plaintiff had any interest in or right to the premises, review the action of the land department thereon and annul it, if erroneous. But as it is, that action can only be reviewed in a suit by the United States to cancel and set aside the patent on the ground that it was illegally issued.

But even if the plaintiff could maintain a suit to affect this patent, yet no mere question of fact decided by the land department in the progress of the matter, or which might have been made therein, can now be reviewed by this court except for fraud or mistake other than an error in judgment in estimating the value or effect of evidence. (*Johnson v. Towsley*, 13 Wall. 83; *Shepley v. Cowen*, 1 Otto, 340; *Aiken v. Ferry*, ante, 79; *Stevens v. Sharp*, ante, 113.)

Therefore, the questions whether Warwick's settlement, occupation, and entry were in fact for himself or for Davis or Tolman, or whether the Marshfield claim was occupied as a town site or settled upon for purposes of business or trade at or prior to Warwick's settlement thereon, can not be inquired of in this suit. For although these questions were not specifically made in the contest in the land department, they were plainly within the scope of the inquiry, and might have been raised and decided if the contestants had desired. Impliedly, the decision of the secretary of the interior—that the Warwick entry was valid and lawful—included every question of fact that might properly have been raised and decided in the progress of the contest concerning it. If the rule were otherwise, this case is a good illustration of the intolerable vexation and delay which would attend the procuring of titles by settlers on the public lands. As has been stated, the contest in the land department was made upon the single proposition that the Warwick donation, being unsurveyed, could not be purchased, and that Warwick's removal from it after a residence thereon of less than two years, and the payment of one dollar and twenty-five cents therefor, was, in effect, an abandonment of his settlement—a failure to perform the conditions subsequent of

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the grant, whereby the premises reverted to the United States and were open to settlement under the town-site law. The proposition that Warwick's settlement was for the benefit of another, or that the place was occupied as a town at and before Warwick's settlement, does not then seem to have been thought of, but they are brought forward at this late day and in this form to defeat and nullify the action of the land department in that contest.

But it appears that even these questions were brought before the department prior to the issue of the patent, and considered by it as upon a motion for a new trial.

On May 11, 1875, the register and receiver forwarded the principal evidence relied on by the plaintiff upon these points to the commissioner, who, on May 29, 1875, submitted the same to the secretary, with a recommendation that the case be opened, which, on September 30, 1875, was refused by the acting secretary. Upon the whole, there is no equity in the bill, or any ground upon which it can be maintained. It is therefore dismissed, with costs. The same decree will be entered in the cases of the following-named plaintiffs against the same defendants: W. F. Deubner, Nos. 489, 490; John Bear, No. 491; George Wolf, No. 492; Frederick Timmerman, No. 493; William G. Webster, No. 494; A. Lobree, No. 495; C. B. Golden, No. 496; William Temple, No. 497.

THE SOUTHERN PACIFIC RAILROAD COMPANY v. PIERPONT ORTON.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 15, 1879.

1. SOUTHERN PACIFIC RAILROAD GRANT.—The road, to aid the construction of which a land grant was made to the Southern Pacific Railroad Company by the act of congress of July 27, 1866, incorporating the Atlantic and Pacific railroad company, was intended by congress to be a road connecting with the contemplated Atlantic and Pacific road at such point on said road near the intersection of the thirty-fifth parallel of latitude and the eastern line of the state, as the Southern Pacific Railroad Company should deem most suitable for a railroad line from said point of connection to San Francisco; the said point of connection

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and the line of road thence to San Francisco to be determined and located by the Southern Pacific railroad company.

2. **LOCATION OF ROAD.**—The line of the road designated on the plat thereof, filed by the Southern Pacific Railroad Company in the office of the commissioner of the general land office on January 3, 1867, is located in pursuance of the terms of said act of congress, and is properly located under said act.
3. **EFFECT OF GRANT AND FILING PLAT.**—The grant made by said act is a *present general* grant of the quantity of land specified in the act; and immediately upon filing the plat, the *general* grant became *specific*, and attached to all the odd sections of land situate within the prescribed limits on each side of the designated line, then owned by the government, to which no other right had attached prior to the filing of said plat.
4. **WITHDRAWAL FROM PRE-EMPTION.**—Immediately upon the filing of the plat, the odd sections designated were withdrawn from pre-emption or other disposition, by force of the act itself, *proprio vigore*, without any order of the secretary of the interior, or notice other than that afforded by the filing of the plat itself.
5. **SAME.**—The lands having been set apart to aid in the construction of a railroad, and absolutely and unconditionally withdrawn from pre-emption, no pre-emption right could be acquired in them while so situated, even if the grantee at the time was unauthorized under the state law to take a perfect title.
6. **POWER OF SECRETARY TO RESTORE LANDS WITHDRAWN FROM PRE-EMPTION.**—The withdrawal of the lands from pre-emption by the statute being absolute and without conditions, the secretary of the interior had no power to repeal or modify the statute, or restore the lands to their former condition. The withdrawal being unconditional by force of the statute, they could only be re-opened to pre-emption by statutory authority.
7. **TITLE OF CORPORATION TO LANDS—TRESPASSERS.**—Where a corporation, authorized to receive grants of land for the purposes of the corporation, brings an action against a trespasser to recover possession of lands granted to it, such trespasser will not be heard to question the title of the corporation, on the ground that it had no authority to take them. This is a question between the state and the corporation.
8. **MISUSE OF CORPORATE FRANCHISE.**—Whether a corporation has misused or abused its franchise is a question between the state and the corporation, which can not be raised or litigated in an action between the corporation and private parties.
9. **ACT OF APRIL 4, 1870, CONSTITUTIONAL.**—The act passed by the legislature of California, April 4, 1870, authorizing the Southern Pacific Railroad Company to change the line of its road, accept the congressional grant of land, and construct its road as provided in the act of congress incorporating the Atlantic and Pacific Railroad Company, was not passed in violation of section 31, article IV of the constitution of California, providing that corporations “shall not be created by special act, except for municipal purposes.”

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10. CONSTRUCTION OF STATE CONSTITUTIONS.—The settled rule of construction of state constitutions is that they are not special grants of powers to legislative bodies, but *general* grants of all legislative powers not actually prohibited or expressly excepted. It is equally well settled that the *exception* must be *strictly* construed. The construction is *strict* against those who stand on the *exception*, and *liberal* in favor of the government itself.
11. SAME.—Under the established rule of strict construction, applicable to state constitutions, an act of the legislature should never be declared unconstitutional, unless there is a clear repugnance between the statute and the organic law.
12. ESSENTIAL ATTRIBUTES OF A CORPORATION.—The essence of a corporation consists only of a capacity to have perpetual succession under a special denomination, and an artificial form; and to take, hold, and grant property, contract obligations, and sue and be sued by its corporate name; and a capacity by its corporate name to receive and enjoy in common, grants of privileges and immunities.
13. CORPORATION A FRANCHISE.—The right to be a corporation is a distinct, independent franchise, complete within itself, having no necessary connection with other distinct franchises, which are the subjects of legislative grant, and which may, or may not be given to corporations once created, as well as to natural persons, as to the legislature may seem advisable.
14. CORPORATE POWERS, strictly speaking, are such as are peculiar to corporations, and essential to their being, and not such powers as are usually, or may be, possessed and enjoyed indifferently by corporations and natural persons.
15. THE CREATION OF A CORPORATION is the bringing into being of an artificial person having the essential attributes of a corporation—the creation of the distinct and independent franchise called a corporation—which, when created, has a capacity, among other things, by its corporate name, to receive and enjoy such other franchises, privileges and immunities, property and rights, as the legislature itself, or other persons, with its permission, may grant to it.
16. FRANCHISES, ETC., GRANTED TO A CORPORATION.—The granting of independent franchises, other than the specific franchise constituting a corporation, and of other privileges and powers, to a pre-existing corporation, are not acts creative of a corporation, but acts regulating the conduct of the existing corporation in its relation to and intercourse with the public and other persons, natural and artificial.
17. THE GIVING OF AUTHORITY TO CHANGE THE LINE OF ITS ROAD to the Southern Pacific Railroad Company, a pre-existing corporation, by the act of April 4, 1870, is not an act creating a corporation, in whole or in part, and is not the creation of a new corporate power.
18. STATE CONSTITUTIONS—SETTLED CONSTRUCTION.—The settled construction of the provisions of a state constitution by the highest court of the state, when not in conflict with any provision of the constitution of the United States, will be adopted and followed by the national courts, what-

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ever their opinion may be as to the correctness of such settled construction.

19. **CONFLICTING CONSTRUCTIONS.**—In 1863, the supreme court of California construed a provision of the state constitution, which construction remained unquestioned by the courts for eleven years, during which time much legislation of a similar character to that in question, and among it that involved in this case, was had, under which important rights had become vested. In 1874, the supreme court, being differently constituted, overruled the prior decision, three of the six justices who sat in the two cases having taken one view, and three the other. The supreme court is now to be again reorganized, with seven members, only one of whom has considered the question as a member of the court of last resort: *Held*, that the construction is *not settled* within the rule, and the national courts are at liberty to adopt the view which appears to them correct.
20. **AMENDED ARTICLES OF ASSOCIATION** were filed by the Southern Pacific Railroad Company, in pursuance of the provisions of a general act of the legislature of California, passed March 1, 1870, applicable to all corporations before created, or to be thereafter created: *Held*, that if the act of April 4, 1870, is void, the plaintiff had full authority to build the road under said act of March 1, and the amended articles of association, filed in pursuance of its provisions.
21. **JOINT RESOLUTION CONSTRUED.**—The “actual settlers,” whose rights are directed to be saved by the joint resolution of congress, passed June 28, 1870, are those who had settled before, and who had existing vested rights at the date of the filing of the plat, and not those who afterwards settled upon the land. The latter could acquire no rights. The grant being a present grant, which attached to the specific lands at the date of the filing of the plat, congress could not divest the rights of the plaintiff, which had once vested, under the act, upon the filing of the plat, except by proper proceedings upon failure of defendant to perform the conditions subsequent.
22. **CAL. STATE TEL. CO. v. ALTA TEL. CO.**, 22 CAL. 398, AND **SAN FRANCISCO v. S. V. WATER WORKS**, 48 ID. 493, considered, and the former approved.

Before SAWYER, Circuit Judge.

THIS is an action to recover possession of certain lands situate in Tulare county. The plaintiff claims title under a congressional grant made to aid in the construction of the Southern Pacific railroad, and a patent issued in pursuance of the grant; and the defendant claims as a pre-emptor.

The Southern Pacific Railroad Company became duly incorporated under the general statute of the state of California of 1861, providing for the incorporation of railroad

companies (Stat. 1861, 607), by filing its articles of association in the office of the secretary of state on December 2, 1865. The act requires, among other things, the articles of association to state "the place from and to which the proposed road is to be constructed, and the counties into and through which it is intended to pass, and its length as near as may be." (Id. 608, sec. 2.) It also provides, that, upon filing the articles, the parties named therein "shall be a body politic and corporate, by the name stated in such articles of association, and shall be capable in law to make all contracts, acquire real and personal property, purchase, hold, convey any and all real and personal property whatever, necessary for the construction, completion, and maintenance of such railroad, and for the erection of all necessary buildings and yards, or places and appurtenances, for the use of the same, and be capable of suing and being sued, and have a common or corporate seal, and make and alter the same at pleasure, and generally to possess all the powers and privileges for the purpose of carrying on the business of the corporation that private individuals and natural persons now enjoy." (Id., sec. 3.)

Section 17, part 1, authorizes "such examinations and surveys for the proposed railroad to be made as may be necessary to the selection of the most advantageous route for the railroad." Part 2. "To receive, hold, take, and convey, by deed or otherwise, the same as a natural person might, or could, do, such voluntary grants and donations of real estate, and other property of every description, as shall be made to it, to aid and encourage the construction, maintenance, and accommodation of such railroad." Part 6. "To cross, join, and unite its railroad with any other railroad, either before or after construction, at any point upon its route," etc. Part 7. "To change the line of its road, in whole or in part, whenever a majority of the directors shall so determine, as is provided hereinafter; but no such change shall vary the general route of such road, as contemplated in the articles of association of such company." Part 8. "To receive by purchase, donation, or otherwise, any lands or other property of any description,

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and to hold and convey the same in any manner the directors may think proper, the same as natural persons might, or could, do, that may be necessary for the construction and maintenance of its road, or for the erection of depots, turnouts, workshops, warehouses, or for any other purposes necessary for the convenience of such companies, in order to transact the business usual for such railroad companies."

Section 18 is as follows: "If, at any time after the location of the line of such railroad, in whole or in part, and the filing of the map thereof, as provided by this act, it shall appear to the directors of such company that the same may be improved, such directors may, from time to time, alter or change the line in any manner they may think proper, and cause a new map to be filed in the office where the map showing the first location is filed, and may thereupon take possession of the land embraced in such new location, that may be required for the construction and maintenance of such road on such new line, either by agreement with the owner, or owners, of such lands, or by such proceedings as are authorized under the provisions of this act, and use and enjoy the same in place of the line for which the new is substituted; but nothing in this act shall be so construed as to confer any powers on such companies to so change their road as to avoid any point named in their articles of association, except as provided in section 17, subdivision 7, of this act."

The said articles of association, filed December 2, 1865, set forth that the corporation was formed "for the purpose of constructing, owning, and maintaining a railroad from *some point on the bay of San Francisco*, in the state of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, *to the town of San Diego*, in said state; thence eastward, *through the said county of San Diego*, to the eastern line of the state of California, there to connect with a contemplated railroad from the eastern line of the state of California to the Mississippi river." At the time of the formation of this corporation, Kern county did not exist, it having been created out of the southern part of Tulare

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and the northern part of Los Angeles counties on April 2, 1866. (Stat. 1865-6, 796.) So that a road running through the western portion of Kern county, as it now is, would on December 2, 1865, have run through Tulare and Los Angeles counties; and the Southern Pacific railroad, as now located and constructed, in fact runs through Tulare and Los Angeles counties, as they existed at the time of the filing of said articles of association, and that part of it in the present Kern county at no great distance from the line then contemplated, as, according to the articles it was to pass out of San Luis Obispo into Tulare and Los Angeles before reaching Santa Barbara, which is not named in the articles, and left to the westward. At this time also, no authority had been given by congress for the construction of any railroad from the Mississippi river to the eastern line of the state of California; although the thirty-third and thirty-fifth parallels of latitude had been publicly discussed as probable lines of future railroads, and it was, therefore, uncertain at what point of the line any road to be projected and constructed would intersect the eastern line of the state. This being the condition of things, congress, on July 27, 1856, passed "An act granting lands to aid in the construction of a railroad and telegraph line from the state of Missouri to the Pacific coast." (14 Stat. 292.) By the first section, the Atlantic and Pacific Railroad Company was incorporated and authorized to construct a railroad from the town of Springfield, in the state of Missouri, to the western boundary line of the state; thence "to the headwaters of the Colorado Chiquito, and thence along the *thirty-fifth parallel of latitude*, as near as may be found suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific." Section 3 provides as follows: "And be it further enacted that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy

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and to hold and convey the same in any manner the directors may think proper, the same as natural persons might, or could, do, that may be necessary for the construction and maintenance of its road, or for the erection of depots, turnouts, workshops, warehouses, or for any other purposes necessary for the convenience of such companies, in order to transact the business usual for such railroad companies."

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transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state; and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, *at the time the line of said road is designated by a plat thereof*, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers." (14 Stat. 294.)

Section 4 provides that when twenty-five miles of the road have been completed according to the act, inspected by commissioners, and verified by them to the president, "patents of lands as aforesaid shall be issued to said company, *confirming* to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road."

Section 6 is as follows: "And be it further enacted that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the *odd* sections of land hereby granted *shall not be liable to sale or entry, or pre-emption before or after they are surveyed except by said company, as provided in this act*; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory

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thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, *shall be*, and the same are hereby, extended, *to all other lands* on the line of said road, when surveyed, *excepting those hereby granted to said company.*"

And section 18 is as follows: "And be it further enacted that the Southern Pacific railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad, herein provided for."

In pursuance of the third section of the said act of congress, the Southern Pacific Railroad Company filed a plat of the line of railroad adopted by it in the office of the commissioner of the general land office on the third day of January, 1867. The line as laid down on the plat filed, commences at a point near the southern end of the bay of San Francisco, and passes through the counties of Santa Clara, Monterey, Fresno, Tulare, Los Angeles (as the counties of Tulare and Los Angeles were constituted when the company was incorporated), and San Bernardino to the Colorado river, to a point on the river near where the thirty-fifth parallel of latitude crosses said river; thus passing through all the counties named in the certificate of incorporation except San Luis Obispo, which was avoided by a deflection to the eastward, and San Diego, which the line did not go far enough south to reach. The deflection carried the line through Fresno and San Bernardino instead of San Luis Obispo and San Diego counties, but it passes through all the other counties named in the articles of incorporation. The northern portion of Los Angeles county through which

the line passed, as the county was constituted at the date of filing the articles of association, is now the southern part of Kern county.

Before the filing of said plat the road had not been finally located, and no map or profile thereof had been filed in the office of the secretary of state of the state of California, as provided by section 43 of the act under which it was incorporated (Stat. 1861, 623), the only designation at the time being that indicated in the articles of incorporation herebefore set out.

On March 22, 1867, an order was issued from the general land office withdrawing from market the odd sections of land lying along the route indicated by said map, filed January 3, 1867. On July 14, 1868, the secretary of the interior revoked the order of withdrawal. On August 14, 1868, the secretary suspended said revoking order of July 14. On November 2, 1869, he revoked said suspension of August 20. On November 11, 1869, he confirmed his order of November 2, and ordered the lands restored to market after sixty days' notice. On December 15, 1869, he again ordered that this restoration should be suspended, which last order has never been revoked. Under these various orders of the secretary, the lands have never been actually restored to the public lands, as the order issued for such restoration was in every instance revoked before the expiration of the time when it was to take effect.

On July 25, 1868, congress passed an act extending the time within which the Southern Pacific Railroad Company should be required to complete the first thirty miles of its road, and requiring it thereafter to complete twenty miles each year till the completion of the road within the time required. (15 Stat. 187.) On June 28, 1870, congress passed a joint resolution, as follows, to wit: "That the Southern Pacific Railroad Company of California may construct its road and telegraph lines, as near as may be, on the route indicated by the map filed by said company, in the department of the interior, on the third day of January, 1867; and upon the construction of each section of said road, in the manuer and within the time provided by

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law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July 27, 1866, and upon the report of the commissioners to the secretary of the interior, that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act." (16 Stat. 382.)

On March 3, 1871, congress passed the act to incorporate the Texas Pacific Railroad Company, in which it authorized the plaintiff, the Southern Pacific Railroad Company, to construct a line of railroad from a point at or near Tehachapa pass by way of Los Angeles to the Texas Pacific railroad, at or near the Colorado river, with the *same rights, etc., as given to it by the act organizing the Atlantic and Pacific Railroad Company.* (16 Stat. 573.)

On March 1, 1870, the legislature of California passed a general act authorizing any corporation organized or to be organized under the laws of the state to amend its articles of association, by making and filing amended articles in the same office where the originals are to be filed. (Stat. 1869-70, 107.) On April 4, 1870, the legislature of California passed an act as follows: "Whereas, by the provisions of a certain act of congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California,' approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers, and authority were vested in and conferred upon the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California;

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therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of congress, and all other acts of congress now in force or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and assigns are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association; and the right, power, and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said acts of congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges and franchises, power and authority conferred upon, granted to, or vested in said company by the said acts of congress, and any act of congress which may be hereafter enacted."

Subsequent to the filing of said plat, on January 3, 1867, and prior to the issue of the patent to the land in question, the legislature of California passed various other acts recognizing and granting rights to the Southern Pacific Railroad Company. Under section 40 of the act under which plaintiff was incorporated, it was authorized to consolidate with any other railroad corporation. (Stat. 1861, 622.)

On October 12, 1870, in pursuance of the general statute, the San Francisco and San Jose Railroad Company, then owning and operating a road from San Francisco through San Mateo county to San Jose, in Santa Clara county, together with other companies consolidated with the said Southern Pacific Railroad Company, taking the name of the main and principal company, the Southern Pacific Railroad Company, by which consolidation the Southern Pacific Railroad Company acquired the railroad extending from San Jose to San Francisco, thereby connecting its line as laid down on the plat filed with the commissioner of the general land office with the city of San Francisco.

On April 15, 1871, in pursuance of the said general act

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of the legislature of California, approved March 1, 1870, the said Southern Pacific Railroad Company filed amended articles of association, which articles, among others, contained the following recitals: "Whereas, by an act of the legislature of the state of California, entitled 'An act relating to certificates of incorporation,' approved March 1, 1870, any corporation then organized, or thereafter to be organized, under the laws of the state of California, is authorized and empowered to amend its articles of association, or certificate of incorporation, by a majority vote of the board of directors or trustees, and by a vote or written assent of the stockholders representing, at least, two thirds of the capital stock of such corporation; and, whereas, by a certain other act of the legislature of the state of California, entitled 'An act to aid in giving effect to an act of congress, relating to the Southern Pacific Railroad Company,' approved April 4, 1870, to enable the said company to more fully and completely comply with and perform the provisions, requirements, and conditions of an act of congress of the United States of America, entitled 'An act granting land to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California,' approved July 27, 1866, and of all other acts of congress then in force, or which might thereafter be enacted, the said Southern Pacific Railroad Company, its successors and assigns, were authorized and empowered to change the line of its railroad, so as to reach the eastern boundary line of the state of California, by such route as said company might determine to be most practicable, and to file new and amendatory articles of association." * * * * "Now, therefore, the board of directors of said Southern Pacific Railroad Company do order and direct that the articles of association of said company be amended so as to read as follows," etc. The object of the corporation as expressed in its amended articles is as follows: Article 2. "The object and purpose of said new corporation shall be to purchase, construct, own, maintain, and operate a continuous line of railroad from the city of San Francisco, in the state of California, through the city and

county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to some point on the Colorado river, in the south-eastern part of the state of California, a distance of seven hundred and twenty miles, as near as may be; also, a line of railroad from a point at or near Taheechaypah pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado river, a distance of three hundred and twenty-four miles, as near as may be; also, a line of railroad from the town of Gilroy, in the county of Santa Clara, in said state, passing through said county, and the counties of Santa Cruz and Monterey, to a point at or near Salinas City, in said last-named county, a distance of forty-five miles, as near as may be; also, such branches to said lines as the board of directors of said new corporation may hereafter consider advantageous to said corporation, and direct to be established."

The road having been constructed through the county of Tulare on the line designated in said plat filed with the commissioner of the general land office January 3, 1867, and on the line described in said amended articles of association, a patent to the lands in question was issued to said plaintiff, the Southern Pacific Railroad Company, in the usual form in such cases, on October 20, 1877, but said patent did not contain any clause "expressly saving and reserving all the rights of actual settlers," prescribed in said joint resolution of congress, passed June 28, 1870. The said lands are situated in the county of Tulare, within the twenty-mile limit as the line is designated on said plat filed with the commissioner of the general land office, and adjacent to the completed portion of the road.

The defendant, Orton, who possessed all the statutory qualifications required to entitle him to pre-empt a portion of the public lands, with his family, settled upon the tract in question, with a view to pre-empt it, on November 1, 1869, where he has ever since resided and cultivated the same, performing the requisite acts to acquire a pre-emption right, if said land was at the time of his entry, or at any time afterwards, subject to pre-emption.

On June 5, 1870, he offered to file a pre-emption claim on the land, but his offer was rejected by the officers of the land office. On September 5, 1878, since the issue of plaintiff's patent, he repeated his offer, and a hearing having been had by order of the secretary of the interior, the register and receiver rendered a decision in his favor, from which plaintiff appealed, and the appeal is still pending.

Lake & McKoon, for the plaintiff.

J. Jacobs, Jr., and L. H. Van Schaick, for defendant.

SAWYER, Circuit Judge (after stating the facts). This case has been argued with great ability by the counsel on both sides. It presents a question of great importance, as upon the decision of the points raised by defendant apparently depends the validity of the entire land grant made by congress to aid in the construction of the Southern Pacific railroad under the act of 1866. If some of the points made are tenable, then, the legislature of California, and the United States congress, both in their original and subsequent legislative action; the officers of the Southern Pacific railroad company, and those who have purchased the granted lands from the company, and those who have purchased the bonds of the company secured by these lands, have all been mistaken as to the rights of the plaintiff derived under these various acts. Under the circumstances, there, certainly, ought to be a very clear case to justify a court in annulling all the rights hitherto supposed to have been acquired by the plaintiff, and those claiming under it in these lands.

The points relied upon by defendant's counsel, as stated in their own language, are as follows: 1. "That the grant was confined to lands along the line of its lawful route [the lawful route of the road] as fixed by its articles of association (articles incorporating the company) and the laws of California." 2. "That the route indicated by the map filed in the general land office on January 3, 1867, and upon which the road is thus far constructed, is without authority of law, and that the grant has not, and can not attach to lands along

that route." 3. "Conceding, for the purposes of the argument, that the route of January 3, 1867, at first unlawful, was subsequently made lawful by the act of the legislature of California of April 4, 1870, and the grant was floated to such new route by the joint resolution of congress of June 28, 1870; yet, by that joint resolution the land in question was excepted from the grant, and that the patent failing to save or reserve the defendant's rights to this land, is issued contrary to the provisions of the joint resolution, and is therefore void."

The first point, then, is, that the land in question does not lie on the line intended by the act of congress making the grant, and is, therefore, not within the grant. In the development and argument of this point it is said, in substance, that congress found a corporation existing under the laws of California, which had adopted in its articles of association a certain line on which it was authorized to construct a road; that it had authority to construct a road on that line, and no other; that its rights must be presumed to have been known to congress, and it must be presumed that congress intended to make its grant along the line indicated in its articles of association, and no other; that the route generally indicated was from a point on the bay of San Francisco, "through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the town of San Diego; thence, through the said county of San Diego to the eastern line of the state of California, there to connect with a contemplated railroad from the said eastern line of the state of California to the Mississippi river;" that this was the line upon which the Southern Pacific Railroad Company was, at the time of the passage of the act, authorized to build a road under the laws of California, and of its organization; and that congress contemplated, and could have contemplated, no other line. I agree with counsel, that congress must be presumed to have passed the act in question with full knowledge of the laws of California under which the Southern Pacific railroad company was organized, and of the extent of the authority of the company under its organization. And the intention of congress in making the

grant must be ascertained from the language of the act in view of this presumption; that is to say, we must construe the act in the light of the circumstances existing at the date of its passage relating to the subject-matter of the act; but the intention must be derived at last from the language of the act itself thus considered. There was but one Southern Pacific Railroad Company to which the grant was made; and the *grantee* named in the act of congress is "the *company* incorporated under the laws of the state of California," not the *road*, or the *line of road* to be built by the company. And it was "authorized to connect with the Atlantic and Pacific railroad, formed under this act, at such point near the boundary line of the state of California as they shall deem most suitable for a railroad to San Francisco." Now, what was the manifest intent of this provision? Obviously to have a road from the point of connection to San Francisco, and the point of connection most suitable for constructing a road therefrom to San Francisco was left to the judgment and discretion of the company, "such point * * * as they shall deem most suitable for a railroad line to San Francisco." It was left to the company, then, by this provision of the statute, to designate the *point* of connection within the limits, and the *line also*; but another provision to be referred to is more specific on the latter point. It is manifestly the intention from this language, if taken by itself, to have a road from the point of connection to San Francisco by the route stated. This intention becomes more apparent by considering other provisions. The Atlantic and Pacific road, by section 1 of the act, was to run "along the *thirty-fifth parallel of latitude*, as near as may be found most suitable for a railway route to the *Colorado river* at such point as may be selected by said *company for crossing*; thence by the most practicable and eligible route to the *Pacific*," not to San Francisco. Congress could not have intended the Southern Pacific Railroad Company to build a road to the Pacific merely, as the Atlantic and Pacific was authorized to do that by a direct route; but a road to connect the Atlantic and Pacific road at some point near the place of crossing the Colorado river, which is the eastern line of the

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state, by the most suitable line with San Francisco. It would be absurd to suppose, in view of the language used, and the provision for extending the Atlantic and Pacific railroad directly to the Pacific, that congress contemplated the building by the Southern Pacific company a railroad from the point of connection near the thirty-fifth parallel a hundred miles south, and some two hundred or more miles to San Diego, at which point, when reached, the road would be as far from San Francisco as from the point of connection whence it started.

San Francisco being the objective point, it could be reached from many points on the Atlantic and Pacific road by lines several hundred miles shorter than from the point of connection near the intersection of the thirty-fifth parallel of latitude and the Colorado river; by the way of San Diego. So, also, upon defendant's own theory, this construction of the language is inadmissible, for it is insisted that congress could not have intended to grant lands along a line not specified in the articles of incorporation of the Southern Pacific Railroad Company. If this be so, then congress could not have intended to make any grant at all, for the general line specified in the articles would not touch either point mentioned in the act—either the point of intersection near the Colorado river, or San Francisco. The line specified in the articles of association is through the county of "San Diego to the town of San Diego in said State; *thence eastward through the said county of San Diego to the eastern line of the state of California.*" The town of San Diego is in the southwestern angle of the state, and a line from the town of San Diego "eastward through the said county of San Diego," would strike the Colorado river in the extreme south-eastern corner of the state, where the Texas Pacific railroad is now to cross the river, and more than two degrees of latitude south from the point of connection named in the act, near the point where the thirty-fifth parallel of latitude crosses the state line. The county of San Diego embraces about the same extent of territory as the three states of Massachusetts, Connecticut, and Rhode Island, and the county of San Bernardino is con-

siderably larger, yet there is no point of the county of San Diego that is within less than a degree of latitude of the point of connection named in said act of congress near the intersection of the eastern line of the state and the thirty-fifth parallel of latitude; the said point being in the county of San Bernardino, through which it would be necessary for a line of road to run many miles away from San Francisco before it could possibly touch the county of San Diego at all; and the articles of association do not mention the county of San Bernardino as one through which the proposed road is to extend. A line of road from any point on the bay of San Francisco, following the route indicated in the articles of association, through Los Angeles and San Diego counties to the town of San Diego, thence *easterly* through the latter county to the Colorado river, could not at any point be within two degrees of latitude of the point near the intersection of the thirty-fifth parallel of latitude and the Colorado river, or eastern line of the state.

So, also, to reach San Francisco a road would necessarily pass from Santa Clara county through the county of San Mateo and the city and county of San Francisco, or the county of Alameda, neither of which counties is mentioned in the articles of association, nor is San Francisco mentioned in the articles as a point to or from which the road is to extend. The Southern Pacific Railroad Company thus far had no better authority under its articles of association for constructing its road from the designated point of intersection to San Francisco by the route which defendant's counsel insisted it should have followed, than by the route adopted in the plat filed. There would be quite as great a deviation from the route claimed by defendant to be the only one that could be pursued, and quite as much unauthorized road to be constructed, as by the route actually adopted. In fact, upon defendant's theory, the Southern Pacific Railroad Company could have constructed no road at all which would have entitled it to the benefit of the grant, and the grant was entirely nugatory. The object of the grant undoubtedly was to secure a line of railroad from a point on the Atlantic and Pacific railroad, designated as near the

line of the state of California, and which road was to cross the state line as near as practicable to the thirty-fifth parallel of latitude to San Francisco, and upon defendant's theory, the grantee was not authorized to build any road for a long distance on each end of the line which congress desired to have built, and the construction and use of which formed the sole consideration of the grant. The fact, then, that the line adopted does not pass through San Luis Obispo and San Diego counties, to the town of San Diego, and thence easterly through San Diego county to the Colorado river, affords no reason for supposing that congress intended to adopt the absurd route of running a hundred miles or more south and away from San Francisco, then by a roundabout way return, in order to secure a railroad line to San Francisco from the point of intersection designated in the act; especially when it made the grant along the line from the point indicated, which the grantee itself "shall deem most suitable for a railroad to San Francisco." There can be no reasonable doubt, therefore, whatever the effect upon the rights of the parties, or whether the purpose was accomplished or not, that congress intended the Southern Pacific railroad company to construct a line of road from the Atlantic and Pacific railroad line, as indicated in the act, at a point in California near the point of intersection of the thirty-fifth parallel of latitude with the eastern line of the state, by the most direct and feasible route to San Francisco; that the question as to which is the most direct and feasible route was left to the company, and that the lands granted are lands lying along said route to be so determined. That the grantee was to locate the line between the points designated is also provided for in section 3 of the act of congress, which section, and all others of the act specifying the rights granted, is applicable to the Southern Pacific Railroad Company as well as to the one created by the act, and is to be read with reference to this part of the line as though the words Southern Pacific Railroad Company were substituted for Atlantic and Pacific Railroad Company in the section. It grants the odd sections "on each side of said railroad line as *said company may adopt* * * * when-

ever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time *the line of said road is designated by a plat thereof*, filed in the office of the commissioner of the general land office." On January 3, 1867, the Southern Pacific Railroad Company filed its plat in pursuance of these several provisions of the act, and the line laid down on the plat ran in a nearly direct line—as direct, doubtless, as practicable—from the supposed point of intersection near the eastern boundary of the state towards San Francisco, to Santa Clara county, where it intersected the San Francisco and San Jose railroad, which extended to San Francisco, and along the route deemed most suitable by the company.

There can be no doubt, therefore, that the line adopted is the one contemplated by the act of congress, and the odd sections on each side of it are the lands actually contemplated by the congressional grant. If the grant was not effectual, then, it was because of an incapacity then, or at any future time, in the company to receive a grant which should in fact vest the legal title; and if the incapacity to receive a grant along this line existed then, as we have seen, for the same reason, it was incapable of receiving any grant under this act as it actually passed, along any line it might have adopted, and the grant was futile. At the date of filing the plat no pre-emption or other right had attached to the lands in question, and they were, therefore, subject to grant and were impressed with every right, restriction, or effect which resulted from the operation of the act, whatever they might be. In section 6 it is provided "that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road *after the general route shall be fixed*, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, entry, or *pre-emption before or after* they are surveyed, *except by said company as provided in this act*; but the provisions of the act of September, 1841, granting pre-emption rights, and acts amendatory thereof, and

of said act entitled, 'An act to secure homesteads to actual settlers on the public domain' * * shall be and the same are hereby extended to *all other* lands on the line of said road *when surveyed*, EXCEPTING *those hereby granted to said company*." Instantly upon the filing of the plat, the odd sections within the prescribed limits on each side of the line indicated became affected by these provisions; and the statute itself, *proprio vigore*, withdrew them from sale, entry, or *pre-emption except by the company*. From that time forth to the present time, no man could acquire a pre-emption right, because it was expressly prohibited by the statute, and these provisions of the statute have never yet been repealed or modified. And this is so, whether the grantee was capable of receiving title or not. The withdrawal is not made to depend upon the capacity of the grantee to take, or upon the grantee's performance of the conditions subsequent, so as to perfect the title, but it is absolute, without conditions, upon the performance of certain designated acts, which were in fact actually performed. The reason for withdrawal, doubtless, was to secure the construction of the road, but there was no provision for restoration of the lands to their former condition in case the object failed. That was left for future consideration by congress. In this act there is not even the provision usual in other acts granting lands for public improvements, that in case of failure to perform the conditions subsequent the lands shall revert to the United States; but the subject is not overlooked, as there is a substitute for such provision in the ninth section, which provides "that if the said company make any breach of the conditions hereof and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the road." It does not provide that the lands shall be open to sale or pre-emption in case of a failure to complete the road. The United States by the act has devoted these odd sections to a construction of the contemplated road, and if the grantee fails to complete it for any cause, whether through incapacity

to do it or otherwise, the government reserves to itself the right to take such other action as it may, upon consideration of the circumstances, deem needful to accomplish the purpose. If the title did not pass to the intended grantee, it might grant the land to other parties for performing the same service. At all events, they have been devoted to that object, and withdrawn absolutely and without conditions from any other disposition. There is no provision requiring the secretary of the interior to issue any order withdrawing them—the act itself has that operation by its own force. The order was, doubtless, proper as a matter of information to those seeking pre-emption locations, so that they might not ignorantly or recklessly settle upon these lands, in which they could acquire no rights, but it is without legal effect. (Mr. Justice Miller in *Knevals v. Hyde*, 20 Alb. L. J. 371.)

So there is no authority anywhere in the act for the secretary of the interior to revoke the withdrawal, or restore the lands to market, or subject them to pre-emption. His various orders were nullities, as he had no authority whatever to repeal or modify the act of congress, expressly withdrawing these lands from pre-emption, or other disposition. Besides, his orders never took effect, for each was revoked or suspended before the time appointed for it to go into operation arrived. As the defendant entered upon these lands after the filing of the plat, and the statutory withdrawal, he was a naked trespasser without right and without the ability to acquire any right from that day to the present, whether the grantee in the act had the capacity to acquire any right or not, and the question may be considered without feeling any embarrassment on account of any right of his, for he is wholly without any, whatever the rights of the railroad company may be. He is a total stranger to the title. But as the plaintiff must recover, if at all, upon its own right, and not on the want of any right in the defendant, it is still necessary to determine whether it is in a position to maintain this action, notwithstanding the total absence of any right to the land in defendant.

This brings us to the second point made by defendant—

that the grant along the line indicated in the plat is without authority of law, and did not, and could not, attach to the lands there situated; that is to say, that by the laws of California the grant could not attach to the lands, whatever the intent of congress, as the company was not authorized by the statute under which it was organized, to construct a road along that line, for the reason that it was not indicated in its articles of association. The Southern Pacific Railroad Company was a corporation duly organized. It was a railroad corporation organized expressly to build a railroad, and a railroad extending from the bay of San Francisco in a south-eastern direction to the eastern boundary of the state, intended ultimately to connect with some transcontinental road which it was supposed would be built at no distant day; but at what point it would enter the state was unknown, and, consequently, the point of the state line which the company desired to reach could not be definitely fixed. It was authorized to receive lands by gift, grant, purchase, or otherwise, for the purposes of its road, and to aid in its construction, without limitation as to amount or location. These facts are undisputed. Congress found this corporation thus organized for the purposes, and with the powers indicated, and made a grant of land to it for the purposes, and on consideration that it should accept the terms, and build a road along the line before indicated, which grant and the conditions were actually accepted, and the road was in fact built according to the conditions of the grant, to entitle it to a patent for the land in question, provided it was capable of receiving the grant. The line of the road adopted, also, started at the point indicated in the articles of association, and ran in a south-easterly direction through the state to its eastern line, to connect with a road to the Mississippi river, the general line of which latter road had in the mean time been fixed, and it ran in the general direction through all the counties, including the one in which the lands are situated, named in the articles of association, except San Luis Obispo, which was left to westward, and the county of San Diego, which was further south, and

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the line adopted turned to the eastward before reaching it, the general object and purpose of the line finally definitely located and adopted being the same as that expressed in the articles of association. The question in this case, as in many others, to place it in the strongest light for defendant, is one of doubt as to whether the corporation exceeded its original powers, or abused its corporate franchise. It was empowered to receive grants of lands for proper purposes, and the question is, whether the building of the road, as actually built, is the proper purpose. It is not like a corporation without capacity, and positively forbidden by the statute to take lands at all for any purpose. It was competent to take and hold lands for some purposes, and the settled rule in cases like this, is that strangers can not litigate the question. It is a matter between the state and the corporation. The company had the physical capacity to perform, and it has performed, in fact, whether rightfully or not, its part of the contract, and the United States is satisfied, and has issued its patent in pursuance of the terms of the act. The United States has done all in its power to vest the title in the company. The state has not complained of any misuse or abuse of the corporate powers of the company. All parties in interest being satisfied, strangers can not complain. The authorities settle this question. In *Cole Silver Mining Co. v. V. & G. H. W. Co.*, 1 Saw. 478, I had occasion to consider an analogous question, and said: "By express provisions of statutes, corporations are usually limited in their purchases of real estate, for instance, to such as are actually necessary to the exigencies of their business. But suppose a much larger amount should be conveyed to a corporation than it was authorized to take, it would not be contended, I apprehend, that a trespasser, who had taken possession of a portion of such excess of land, could successfully set up a want of capacity in the corporation to take, as a defense to an action of ejectment by the corporation. As between the party despoiled and the wrong-doer, the courts will not enter upon the inquiry." And I cited the following authorities which sustain the position: *Far. and M. Bank of Mil. v. D. and M. R. Co.*,

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17 Wis. 372; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 102; *Whit. M. Co. v. Baker*, 3 Nev. 391; *Natoma Wat. and Min. Co. v. Clarkin*, 14 Cal. 552. The court says, in 3 Nev. 391, after discussing the question: "A deed, then, to a mining corporation is not void upon its face. If they have violated the law, in taking a greater quantity of land than is allowable, then they have committed a wrong, not against any particular individual, but against the whole community, and this wrong can only be inquired into by a proceeding on the part of the state. Their deed to the land, if they buy from one having title, or their possession, if they only derive title from occupation, gives them a right to hold against all the world except the state."

In *Natoma Water and Min. Co. v. Clarkin*, 14 Cal. 552, Mr. Chief Justice Field, speaking for the court, says: "Whether or not the premises in controversy are necessary for these purposes [of the corporation], it is not material to inquire; that is a matter between the government and the corporation, and is no concern of the defendants. It would lead to infinite inconveniences and embarrassments, if, in suits by corporations to recover the possession of property, inquiries were permitted as to the necessity of such property for the purposes of their corporation, and the title made to rest upon the existence of such necessity. (See *The Bank v. Poiteaux*, 3 Rand. 136; and Ang. & A. on Corporations, 113-121.)*" To the same effect are *Cal. State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 429, 430; *R. and B. R. Co. v. Procktor*, 29 Vt. 93; *Bissel v. M. S. and N. I. R. Co.*, 22 N. Y. 259; *People v. Society*, 1 Paine C. C. 653; *Silver Lake Bank v. North*, 4 Johns. Ch. 371; *Terrett v. Tylor*, 9 Cranch, 51, 52; *Knevals v. Hyle*, 20 Alb. L. J. 371. Numerous other cases might be cited to show that whether a corporation has violated its charter by misuse or abuse of its corporate franchise by usurpation of powers, is a question between it and the state alone, to be inquired into on a direct proceeding for that purpose. The same principle is recognized by the United States supreme court in *Schulenberg v. Harriman*, 21 Wall.

* Affirmed in *Cowell v. Springs Co.*, 100 U. S. 60, 61, decided since the decision of this case; also *Christian Union v. Yount*, 11 Id. 361.

62. In discussing the mode by which a present grant to land by the government to the state of Wisconsin to aid the construction of a railroad, becomes attached to specific land by a location of the road, Mr. Justice Field, speaking for the court, said: "No individual can call in question the validity of the proceedings by which precision is thus given to the title, when the United States are satisfied with them." Again, on page 63, speaking of failure of title for breach of condition subsequent: "And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the condition annexed." (See also *U. S. v. Repentigny*, 5 Wall. 267, 268.) The state of California and the United States being satisfied with the acts of the plaintiff in respect to the use of its franchise, the grant, and construction of the road, the defendant, a mere stranger, without any interest whatever, can not raise the question relied on in this point.

But by holding that defendant is not in a position to attack the validity of the grant on this point, I do not mean to cast any suspicion upon the validity of plaintiff's title upon the facts herein stated, even if the question could be raised by defendant and determined in this action. Considering the vast interests involved, and the number of persons who must have become interested as purchasers from the plaintiff, and in securities resting on the plaintiff's title, I do not feel at liberty to leave the case on that point alone. I may be wrong in the conclusion reached; and the point made on the validity of the title is presented by the record, and must be determined if the defendant turns out to be entitled to urge it; and it has been fully argued and relied on by counsel for the defense. I shall, therefore, proceed to decide it as one of the points in the case. In my judgment, the title of the plaintiff is valid, and, so far as it can be done in this action, the question ought to be determined, and finally set at rest. As before stated, the object of congress in making the grant was to secure a railroad from a point in Missouri already having eastern con-

nections, through the states of Missouri and northern Texas, the territories of the United States, and the state of California to the Pacific ocean, with a branch extending from the point designated near the eastern line of the state of California to San Francisco, which road could be used by the government for the purposes and upon the terms specified in the act, among which were that it was to be a postal and military road. The act authorizes the corporation created by it to construct portions of its road through three different states, without any provision for procuring authority from, or the consent of, the respective states. If congress has power to create a corporation with such authority, it is, doubtless, found in those provisions of the constitution relating to the regulation of commerce among the states, its war power, its control over postal matters, and other cognate powers. If congress can create an instrument and confer upon it such authority without consent of the states, it would seem that it might select an instrument already created by a state, and confer upon it such additional powers and authority, if any are required, as may be necessary to effect the same objects. If it could confer the authority upon a corporation of its own creation, it could confer it upon a natural person, and why not upon a state railroad corporation? However this may be, congress in making this grant must be presumed to have been familiar with the organization and powers of the Southern Pacific railroad company, and to have made the grant in question with full knowledge of the situation, and the grants were made upon the condition subsequent of building the road. To ultimately perfect the title, it was necessary for the grantee to do everything necessary to complete the road, and if the procurement of additional powers from the state was essential to that object, then it was as necessary to procure those powers in some proper mode, as to do any other essential act; and whether necessary or not, the legislature of California did in fact pass the act of April 4, 1870, mentioned in the statement of facts authorizing said company to change the line of its road if necessary, and authorizing it to construct and maintain the

road provided for in said act of congress. If, therefore, there was before a want of such authority, it was given by this act, provided the act itself in these particulars is constitutional.

But it is insisted that this act was passed in violation of the provisions of section 31 of article IV of the constitution of California, which reads: "Corporations may be *formed* under general laws, but shall not be *created* by special act, except for municipal purposes."

After a careful consideration of the question, I am myself unable to perceive wherein that portion of the act, at least, which authorizes the company to change the line of its road, and to accept the grant made by, and to build the road provided for in the act of congress, is in contravention of this provision of the constitution. It is unnecessary to consider the provision of this act authorizing the corporation to file amended articles of association, for if that be conceded to be in excess of the legislative power, it can be separated from the others, and does not vitiate the other provisions. I do not perceive that any amendment of the articles was necessary, for the corporation was already formed or created—was already in existence with all the essential faculties that go to make up a corporation for building a railroad; and the act authorizing the change of line and acceptance of the congressional grant with its conditions, only granted to an existing person permission to do a thing which had no necessary relation to the *corporate* grantee, and was not at all essential to the existence of the legal entry created by law, or to any other person, natural or artificial. But if an amendment to the articles was necessary, it was already authorized and provided for by the prior act of March 1, 1870; and it was not necessary to repeat the authority in this act; and the act of March 1 is a *general* act, and, therefore, not obnoxious to the objection urged against the said act of April 4, 1870. The settled rule of construction of state constitutions is that they are not special grants of power to legislative bodies, like the constitution of the United States; but general grants of all the usually recognized powers of legislation not actually

prohibited or expressly excepted. In the language of Mr. Justice Shafter, in *Bourland v. Hildreth*, 26 Cal. 183, "the constitution is not a grant of power, or an enabling act to the legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears either by express terms or by necessary implication; and the delicate office of declaring an act of the legislature unconstitutional and void, should never be exercised unless there be a clear repugnancy between the statute and the organic law." (See also *Id.* 215, 225, *et seq.*; *People v. Sassovich*, 29 *Id.* 482; *S. & V. R. Co. v. City of Stockton*, 41 *Id.* 161.) And it is equally well settled that the *exception* must be *strictly* construed. In the language of Mr. Chief Justice Wallace, in the last case cited, "the construction is '*strict against those who stand upon the exception; and liberal in favor of the government itself.*'" (41 *Id.* 162.) And in *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 160, Mr. Chief Justice Black said upon the same subject: "The federal constitution confers powers expressly enumerated; that of the state contains a *general grant of all powers not excepted*. The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict *against those who stand upon the exceptions, and liberal in favor of the government itself*; the federal government can do nothing but what is authorized expressly, or by clear implication; the state *may do whatever is not prohibited.*"

The authorities establishing this canon of construction are numerous, and so far as I know, uniform. Bearing this rule of construction in mind, what does the constitutional prohibition relied on mean? The only prohibitory words are, that corporations of the class in question "shall not be *CREATED* by special act." The word, create, has a clear, well-settled, and well-understood signification. It means to bring into being, to cause to exist; to produce, to make, etc. To my apprehension, it appears to be one thing to create, or bring into being, a corporation, and quite another to deal with it as an existing entity, a person, after it is created by regulating its intercourse, relations, and

acts as to other existing persons, natural and artificial. "A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual." (2 Kent Com., 9th ed. 306.) The ordinary incidents to a corporation are to have perpetual succession, and the power of electing or otherwise providing members in the place of those removed by death or otherwise; to sue and be sued; to grant and receive and to purchase and hold lands and chattels by their *corporate name*; to have a common seal; to make by-laws for the government of the corporation; and sometimes the power of motion or removal of members. "The essence of a corporation consists only of a capacity to have perpetual succession under a special denomination, and an artificial form, and to take and grant property, contract obligations, and sue and be sued by its corporate name, and to *receive and enjoy in common* grants of privileges and immunities." (Id. 325.) The creative act necessarily extends only to the bringing into being of an artificial person, with the capacities stated, among which is "a *capacity* to receive and enjoy in common grants and privileges and immunities;" that is to say, a capacity to receive and enjoy such grants, privileges, and immunities as may be made either at the time of the creation or any other time. The creation of the being with the capacity to receive grants is one thing; the granting of other privileges and immunities, which it has the capacity to receive when created, is another. When such a being is brought into existence, a corporation has been created. A legal entity, a person, has been created, with a capacity to do by its corporate name such things as the legislative power may permit, and receive such grants of such rights and privileges, and of such property as the legislature itself or private persons with the legislative permission may give. But I do not understand that every right, privilege, or grant that can be conferred upon a corporation, must be given simultaneously with the

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creative act of incorporation. On the contrary, I suppose the artificial being must be created with a capacity to receive before anything can be received. The right to be a corporation is itself a separate, distinct, and independent franchise, complete within itself. And a corporation having been created, enjoying this franchise, may receive a grant and enjoy other distinct and independent franchises, such as may be granted to and enjoyed by natural persons; but because it enjoys the latter franchises, they do not, therefore, constitute a part of the distinct and independent essential franchise—the right to be a corporation. They are additional franchises given to the corporation, and not parts of the corporation itself—not of the essence of the corporation. Natural persons, with certain physical capacities, being brought into existence through the processes appointed by nature, may be prohibited by law from doing one thing, and permitted to do another; may enjoy one franchise, and be excluded from the enjoyment of another; but these permissions and prohibitions constitute no part of the person, and were in no manner connected with the creative act. So, with reference to corporations, being once created, they have the physical capacity, through their officers, to do anything that a natural person may do; such as building a church, a steamship, or a railroad. But being created, they may be prohibited from doing one thing and permitted to do another, like natural persons; but this permission or prohibition is not a creative act, but an act regulating the conduct of the corporation, and determining its rights and relations to the public, and to other existing persons, natural and artificial. *Corporate* powers, strictly speaking, I suppose, are those peculiar and essential to a corporation—not those which are or may be possessed in common with natural persons; and they are very few in number, embracing those which pertain to the essence of the corporation. The term is, undoubtedly, often and conveniently used in a broader sense, but it is not found in the constitutional provision in question. Section 33 of article IV defines the term corporation, as used in the constitution, and says it “shall be construed to include all associations and joint stock companies

having *any of the powers of corporations not possessed by individuals or partnerships.*" Of course it excludes all associations that do not have any powers other than those possessed by individuals and partnerships. And this provision is a recognition of the idea that *corporate* powers are only such as are not possessed in common with individuals and partnerships—or natural persons. The power to create a corporation, as the terms are used in section 33, extends, therefore, to the bringing into being of a legal entity, having powers and privileges not possessed by individuals; that is to say, possessing the powers, which, as before stated, constitute the essence of a corporation, or corporate powers, strictly speaking, and has no reference to the legislative dealings with that artificial person after its creation. I suppose the constitution might have devolved the power of creating a corporation on some other body, as the supreme court, and the power to deal with it after its creation—to regulate its conduct and relations to the public, and to prescribe its rights, powers, and duties, other than those strictly corporate, to the legislature. Had it been so provided, there can be no doubt that such powers would have been wholly distinct and independent. I do not perceive that they are any the less so, because exercised by the same body. The act of creating a corporation by conferring upon an association of individuals certain strictly corporate powers, embracing only powers and privileges not possessed by individuals and partnerships, and then granting to it other privileges, enlarging or restricting its right to the enjoyment of other franchises that may be possessed in common with natural persons, and regulating its external relations, are, to my mind, distinct and independent, and I find nothing in the constitution prohibiting the latter power to the legislature. There are numerous, distinct, independent franchises, any one or more of which may be granted indifferently either to natural persons or existing corporations, and in my judgment, the constitution no more prohibits the granting of any one of those franchises, except such as are expressly prohibited to corporations by special act, than to individuals.

It only prohibits the *creation* of a corporation by special act—that is to say, that the creating or granting of the *particular franchise constituting* a corporation shall not be by special act. The prohibition applies to no other of the numerous franchises which are subjects of legislative grant.

In this case there was a corporation—a railroad corporation—duly created under the general act, for the purpose of building a railroad in a south-eastern direction through the state of California to the eastern line of the state to intersect with a road which it was supposed would soon be built to the eastern states, the route of which was still undetermined and uncertain. It had all the faculties physically necessary to enable it to build any railroad. Afterwards congress authorized the building of a road across the continent on or near the thirty-fifth parallel of latitude to intersect the line of the state at a point different from that designated in the articles of association of said corporation, and made a grant to the corporation on condition that it should build a road from a point of intersection with said transcontinental road, near the eastern line of the state, to San Francisco, and the legislature, by special act, authorized the said corporation already in existence with authority and capacity to build a railroad, to build its road upon said line, and accept and receive said grant. In my judgment this is in no sense an act creating a corporation, or a new corporate power, or new corporate franchise within the proper meaning of the term, but a dealing with a corporation already in existence authorized to build a road in the same general direction, with the same object in view; that the change of line was a matter of detail only, and if not, but on the contrary, the grant of an independent right, and an additional privilege or franchise, it was still one entirely competent for the legislature to confer upon the existing corporation, as well as on any natural person, and in no way obnoxious to the provision prohibiting the creation of a corporation for such purpose by special act. To reach any other conclusion would be to violate the canon of constitutional construction before stated; to disregard the plain meaning of the terms used in the constitution, and upon

imaginary grounds interpolate into that instrument language which the people have not seen fit to place there themselves. As said, in substance, by Mr. Justice Crocker in *Cal. State Tel. Co. v. Alta Telegraph Co.*, 22 Cal. 425, to give the constitution any such construction as claimed, we would have to make it read thus: "Corporations may be formed, and other franchises and special privileges granted, under general laws, but shall not be created, nor shall other franchises or special privileges be granted by special act, except for municipal purposes." He well remarks: "If such had been the meaning intended by the framers of the constitution they could easily have expressed it in apt words. The language used by them is clear, and they well knew that it included *but one* of the numerous class of franchises the subject of legislative grant, and that a regulation of *one* could not by any reasonable implication be extended to others *not mentioned*." The constitution descends to particulars when it is necessary to express the intent of its framers, as in section 34, which reads as follows: "The legislature shall have no power to pass any act granting any charter for banking purposes; but associations may be formed, under general laws, for the deposit of gold and silver, but no such association shall make, issue, or put in circulation any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money." There is no restriction upon the legislative power to grant the right to build railroads and other privileges and franchises to natural persons, and our statutes are full of such grants. As examples, see railroad grants, Stat. 1862, pp. 97, 295, and Stat. 1878-79, 698, 841. There would seem to be no good reason for a prohibition of such grants to railroad companies once duly organized, when the same character of grants can be made *ad libitum* to natural persons.

The United States supreme court sustains these views in the recent case of *Wallace v. Loomis*, 97 U. S. 154, arising under a provision of the constitution of Alabama in the identical words of our constitution under consideration. A special statute of Alabama "authorized the Mills Valley Railroad

Company, a pre-existing corporation, to purchase the railroad and franchises of the North-east and South-western railroad company, another pre-existing corporation; and after doing so, to change its own name to that of the Alabama and Chattanooga Railroad Company." This act was claimed to be in violation of the constitutional provision referred to, and Mr. Justice Bradley, speaking for the court, in overruling the point, says: "We are unable to see anything in this legislation repugnant to the constitutional provision referred to. That provision can not simply be construed to prohibit the legislature from changing the name of the corporation, or from giving it power to purchase additional property, and this was all it did in this case. No new corporate powers or franchises were created." (See also, *Pacific Bank v. De Ro*, 37 Cal. 540.) The court must necessarily have taken the view as to what constitutes corporate powers and franchises maintained in this opinion. For it will not be denied that the power to purchase and own a railroad which a company was not before authorized to do, is a highly important one, and embraces highly important franchises; and in fact, all the powers and franchises necessary to enable a corporation to build and own a railroad; and if the power was not possessed before, it must be *new*. If they are not *corporate* powers and franchises, when held and exercised by a corporation, it is because they are not peculiar to corporations, but such as may be granted to, possessed, and enjoyed by natural persons in common with corporations, or else that the granting of corporate powers and franchises to an existing corporation is not the creation of a corporation or a corporate power. This case clearly covers the case in hand; for if this right to purchase and enjoy another wholly different and independent road, and to change the name of the corporation, does not create a new corporate power, much less would the right to change the line of a road only generally indicated and not definitely located.

I should have contented myself with a simple reference to this authority without any discussion of the question, but for the fact that defendant has cited the case of *San Francisco v. The Spring Valley Water Works*, 48 Cal. 493, decided

by the supreme court of the state, in which it is held that corporations can exercise no powers except such as are conferred by the general laws under which they are formed, and that the legislature can not confer on such corporations any powers, or grant them any privileges by special act; which decision they claim to be controlling in this court, notwithstanding the decision of the United States supreme court upon a like provision in the constitution of another state to the contrary. It is true that the *settled* construction of the provision of a state constitution by the highest court of the state, not in conflict with any provision of the constitution of the United States, will be adopted and followed by the national courts, whatever their opinion as to the correctness of the settled construction may be. It becomes necessary, therefore, to consider whether the decision cited is within the rule invoked. In my opinion it is not. In 1863, the same question arose in *Cal. State Telegraph Co. v. Alta Telegraph Co.*, 22 Id. 398, and was elaborately considered. It was then held that the legislature might confer upon existing corporations by special act, a direct grant of special privileges and franchises; and that there was no restriction upon the power imposed by the constitution, except as to the particular privileges therein specified. The court was then composed of three justices, but only two of them appear to have participated in the decision. This construction does not appear to have ever been questioned till the case of *San Francisco v. Spring Valley Water Works*, which arose in 1874, eleven years afterwards. This case was vigorously and persistently contested on every point that the ingenuity of able counsel could suggest, yet, upon the *first* appeal, and upon the *first* hearing of the *second* appeal, the point was not even made, doubtless for the reason that the construction of the constitution was supposed to be finally settled. But, failing upon all other points, counsel obtained a rehearing, then raising and urging for the first time, seemingly as a forlorn hope, the constitutional point under consideration with the result before stated.

At this time the supreme court was composed of five jus-

tices, of whom the chief justice, having been interested, took no part in the decision. Of the other four, three concurred, while the fourth delivered a vigorous dissenting opinion. Thus, of the six justices of the supreme court, who have considered the question, three took one view and three the other, so they stand in number equally balanced.

The able and eminent justice who delivered the opinion of the court in the last case, for whose opinion I entertain profound respect, very ably presented the same views adopted in his opinion, in his argument as counsel in the former case, so that the court in the first case did not overlook, but, on the contrary, fully considered them. Had the justices who have passed upon the question in the two cases sat as one court, there would have been no decision of the question. Thus the matter stands equally balanced, the only difference as authority being that the decision against the constitutionality of the power is last.

The supreme court, as it will be hereafter organized, consists of seven members, six justices and a chief justice, who may be called upon to decide the point, only one of whom was a member when the former cases were decided. What view the new court may take of the question, of course, can not now be known; but probably under the circumstances, the justices will feel at liberty to consider the question as still unsettled, and upon further consideration to give effect to their own views, whatever they may turn out to be, especially so as the view adopted in the last case must invalidate a large amount of legislation, under which important rights must have become vested, had before the promulgation of the decision, if not some of the legislation since that time. Upon the strict doctrine of the last case, it would seem to be impossible to legislate at all by special act, so as to affect in any way any existing corporation; because, under the view of the court, any legislation at all must add to or take from its corporate powers and privileges, and to that extent modify its charter and create a new corporation.

A construction resulting in so numerous and manifest inconveniences should not be adopted unless the language

of the constitution clearly and imperatively requires it, and, unless clearly apparent, can not be adopted without violation of the canon of construction before stated. If the construction given in the first case cited, acquiesced in for eleven years, did not become "settled," the second decision, under the circumstances, certainly can not be regarded as setting the question at rest.

For these reasons, under the following authorities, I feel at liberty to adopt my own, and the views of the United States supreme court, which accord with the first case decided by the supreme court of California, and not with the second. (*O. L. Ins. & T. Co. v. Debolt*, 16 How. 431, 432; *Gelpcke v. City of Dubuque*, 1 Wall. 206.) But this case falls within the principle decided in the two cases cited, as well as others, in another particular. The act in question was passed and acted upon by the railroad company four years before the decision in *San Francisco v. S. V. W. W.*, and rights have become vested under it. During all that time it was the settled construction of the constitutional provision in question that such legislation was valid. The act, therefore, became a contract between the state and the company, under which the latter entered upon the construction of its road in pursuance of the terms of the several statutes mentioned. In the last case cited, the court, quoting from the opinion in the next preceding case, says: "The sound and true rule is, that if the contract, when made, was valid by the laws of the state, *as then expounded* by all the departments of the government and *administered in its courts of justice*, its validity and obligation can not be impaired by any subsequent legislation, or *decision of its courts altering the construction of the law*. The same principle applies when *there is a change of judicial decision as to the constitutional power of the legislature to enact the law*. To this rule we adhere. It is the law of this court, *It rests upon the plainest principles of justice*. To hold otherwise would be as unjust as to hold that rights acquired under statutes may be lost by repeal. The rule embraces this case." (1 Wall. 206.) And so it does the case now in hand. The settled judicial construction of a constitu-

tional provision as well as of a statute is regarded as incorporated into and becoming a part of the instrument itself. Says the supreme court of the United States: "The exposition of both [constitution and statute] belongs to the judicial department of the government of the state, and its decision is final and binding upon all other departments of that government, and upon the people themselves until they see fit to change their constitution, and this court receives such settled construction as a part of the FUNDAMENTAL law of the state." (*Webster v. Cooper*, 14 How. 504.) Upon the principle established by these cases, and many others that might be cited, the construction of the constitutional provision in question adopted in the *Alta Telegraph case*, in 22 California, became and continued a part of the fundamental law of the state for eleven years, till what in effect became, under these authorities, the judicial amendment in *S. V. W. Works case*, in 1874; and the act in question was valid at the time it was passed, and the rights acquired under it are not vitiated by the change in the personnel of the court, and the consequent change in the construction of the constitution. I, therefore, hold the act of April 4, 1870, authorizing the defendant to build its road upon the line indicated in the plat filed with the commissioner of the general land office, and to accept the congressional grant, was a valid act, and at the time of its passage conferred the rights and powers indicated upon the Southern Pacific railroad company.

But if mistaken in these views, the rights contemplated by the act vested in the company upon still another ground. We have seen by the preceding statement of facts, that on March 1, 1870, the legislature of California passed a general act authorizing "any corporation now or hereafter organized under the laws of this state" to amend its articles of association by filing new and amended articles in the same office in which the originals are filed. This power of amendment is unlimited except as provided in the act, none of which limitations affect the questions involved in this case. This is not a special, but a general act, and is applicable to all corporations. It has not even been suggested that there is

any constitutional objection to this act, or that it is in any particular invalid. In pursuance of the provisions of this act, the Southern Pacific Railroad Company, on April 15, 1871, filed amended articles of association reciting the act, and also the said act of April 4, 1870, in which it declared its objects to be "to purchase, construct, own, maintain, and operate a continuous line of railroad from the city of San Francisco, in the state of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego to some point on the Colorado river," etc., also a line from Tahuchapa pass by way of Los Angeles to the Texas Pacific railroad, and such branches as the board of directors might afterwards deem advantageous. These articles cover the line embraced in the plat contiguous to the lands in question, and also a continuation from Tabuchapa pass to connect with the Texas Pacific railroad, which in the mean time had been authorized by congress. So that the rights of the Southern Pacific railroad company, along the line contiguous to the lands in question, were perfected under this general act, and the amended articles of association, if not under the other act considered of April 4, 1870.

It only remains to consider the last point made upon the effect of the joint resolution passed by congress mentioned in the statement of facts. It is insisted that the closing paragraph of the resolution directing the issue of patents "expressly saving and reserving all rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act," extended the exceptions of the grant which only embraced rights vested at the date of the filing of the plat, and protected all parties entering with intent to pre-empt after as well as before the filing of the plat, at least down to the date of the passage of the joint resolution, or to the date of the passage of the said act of April 4, 1870, authorizing the building of the road on the line indicated in the plat. I do not think the saving clause was intended to refer to any other settlers than those who were actual settlers before and at the time of the filing

of the plat. Those settling subsequently could acquire no rights. Whatever may be the proper construction of this clause of the joint resolution, it can not affect the rights of the parties. So far as the rights of the United States are concerned, the words of grant in the act of congress, "there be and hereby is granted," are words of present grant, and pass the title out of the United States—at least the equitable title—only to be defeated by failure to perform the conditions subsequent. The right to so much land vested at the date of the passage of the act, and attached to the specific land at the moment of filing the plat as provided in the act. This is thoroughly settled by a long line of decisions. (*Schulenberg v. Harriman*, 21 Wall. 60; *Leav. etc. R. Co. v. U. S.*, 92 U. S. 741; *Railroad v. Smith*, 9 Wall. 95; *Ryan v. C. P. R. R. Co.*, 5 Saw. 262; S. C., 99 U. S. 383; *C. P. R. R. Co. v. Dyer*, 1 Saw. 641; *Knevals v. Hyde*, 20 Alb. L. J. 370.)

After the right vested, congress itself could not affect it by legislation. It could only be divested by failure to perform the conditions and proper proceedings to revest the title in the government. These lands were absolutely and unconditionally withdrawn from pre-emption by the act of congress itself, *proprio vigore*, without any other act or notice, upon filing the plat and the right to the land vested in defendant before the passage of the resolution. (*Knevals v. Hyde*, *supra*.) So, also, the act making the grant provided for the issue of patents "confirming" the title to the grantees without those conditions, and it was not in the power of congress by joint resolution to annex other conditions. Even if the right to the lands did not become perfect until the right to build the road was perfected by the said acts of the legislature of California, and the amendments of the articles of association, as before stated, the lands were protected from pre-emption claimants by the sixth section of the act of congress, so that the defendant could acquire no rights whatever upon which the saving clause could operate. The joint resolution, therefore, did not divest the title which had vested under the act of congress, and did not affect the rights of the parties. The ob-

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ject of the resolution seems to have been to relieve the doubts of the secretary of the interior as to what the rights of the company were—a formal expression of congressional opinion. But if the clause be regarded as prescribed by law, its omission does not affect the patent so far as it is otherwise valid. The most that can be said is, that its omission does not vitiate any rights that ought to have been protected by its insertion. Those, like the defendant, who have no rights to protect, can not complain of the omission.

It follows that the title to the lands in question is in the plaintiff, and the defendant has no title, and his possession is wrongful. There must be findings and judgment for the plaintiff, and it is so ordered.

THE UNITED STATES v. PHOEBE HUMASON.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 15, 1879.

1. CONDITIONS IN BOND.—Where an officer is required by his superior, *colore officii*, to give a bond, with stipulations or provisions in the condition thereof, not required by statute, the bond is void *in toto*.
2. PUBLIC MONEY.—The parties to an official bond for the safe keeping or accounting for public money are not liable for the loss of the same when such loss is caused by the act of God or the public enemy.
3. CONDITION.—The performance of an express contract is not excused by reason of anything accruing after the contract; but in the case of a condition in a bond to do a thing, performance is excused when prevented by the law or an overruling necessity.

Before DEADY, District Judge.

THE action is brought against the defendant as the executrix of the will of Orlando Humason, deceased, upon two bonds executed by William Logan, in his life-time, as Indian agent for Oregon, together with said Humason and others, as sureties; the one on August 1, 1861, in the penal sum of twenty-five thousand dollars, and the other on July 1, 1862, in the sum of twenty thousand dollars; and both conditioned that said Logan would “carefully discharge the duties” of such office and “faithfully expend all public

moneys, and honestly account for the same, and for all public property which shall or may come into his hands, without fraud or delay." It is also stated in the conditions of the bonds, that Logan had been appointed Indian agent for Oregon, and had accepted the office. The case was before the court, on a prior occasion, on a demurrer to the complaint, which was overruled. (See 5 Saw. 537.)

Rufus Mallory, for the plaintiff.

Seneca Smith, for the defendant.

DEADY, J. The breach alleged of the condition of the first bond is a failure to account for one thousand and six dollars and six cents of the public moneys received by Logan as such Indian agent, and of the second, a like failure for seven thousand six hundred and seventy-eight dollars and sixty-six cents.

The answer of the defendant, besides the denial, contains five separate pleas or defenses; the first and third being to the count upon the first bond, and the second and fourth to the count on the second one, and the fifth one to both. The plaintiff demurs to the third, fourth, and fifth pleas because they do not constitute a defense to the action.

The third plea sets forth in effect that the first bond was prepared and sent to Logan by the interior department, through the then acting commissioner of Indian affairs, Charles E. Mix, who required the defendant to execute the same, with sufficient sureties, before he should be allowed to exercise the duties of said office or receive the emoluments of the same; that the conditions of said bond were wholly variant from those required by statute, and enlarged the duties and responsibilities of said Logan and his sureties; and so the said bond was extorted from said Logan by color of office, as a condition of his remaining in said office, and receiving the emoluments thereof, and is therefore void and of no effect.

The fourth plea is similar to the third.

The fifth plea states, that about July, 1862, while in the discharge of his duties as said Indian agent, under the ap-

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pointment of July 1, 1862, said Logan sailed on the steamship *Brother Jonathun* from San Francisco for Portland, Oregon, with the sum of five thousand dollars, which he had received from the plaintiff as said agent, with instructions to transport the same thereon to Oregon; that said steamship, while pursuing said voyage, was lost at sea, and said Logan was drowned, and said sum of money was, while being so transported, without any fault or negligence of his, lost in the Pacific ocean.

Section 4 of the act of June 30, 1834 (4 Stat. 735), which was made applicable to Indian agents in Oregon by section 4 of the act of June 5, 1850 (9 Id. 437), providing for the appointment of such agents, provides that Indian agents shall hold their offices for the term of four years, and "shall give bond, with two or more sureties, in the penal sum of two thousand dollars for the faithful execution of the same."

By section 4 of the act of June 5, 1850, *supra*, it was declared that each Indian agent thereby provided for should "perform all the duties of agent to such tribe or tribes of Indians in the territory of Oregon as shall be assigned to him by the superintendent."

All the condition, then, which the statute required in the agent's bond was, that he would faithfully execute his office—perform the duties thereof—and no more was necessary. But the bonds in suit seem to have been prepared without reference to the law, and the conditions are much broader than the statute requires, or was necessary. By these, Logan was not only required to account for the money and property which might come into his hands as Indian agent, but for all public moneys and property, however or in whatsoever character received.

In *U. S. v. Bradley*, 10 Pet. 343, it was held, in the language of the syllabus of the case, that a "bond given to the United States by a paymaster and his sureties, one part of the condition being in conformity with the act of congress which directed bonds to be taken from paymasters, is valid in that part, though it also contained other stipulations not required by the act, these latter being distinct and

separable from the former, and it not appearing that any compulsion was used to obtain the bond."

But here it is a question whether the authorized and unauthorized provisions of the conditions are separable or not (*U. S. v. Mynderse*, 12 Int. R. R. 98); while it is distinctly alleged in the pleas that the bonds were obtained by compulsion.

In *U. S. v. Tingey*, 5 Pet. 115, the circumstances were exactly like those in the case at bar. The principal in the bond was a purser in the navy, and the condition required by the statute was, that he would faithfully perform all the duties of purser in the navy of the United States, while the condition written in the bond was, that he would account for all public moneys and property received by him or committed to his care, without limiting his liability to such as might come into his hands as purser. The defendant, a surety on the bond, pleaded these facts, and alleged that the bond was extorted from the principal by the secretary of the navy under color of office, as a condition of his remaining in the office of purser and receiving the emoluments thereof. Upon a demurrer to the plea in the circuit court it was held to be a good defense, and the judgment was affirmed by the supreme court.

The court after stating the fact that the condition of the bond was different from that prescribed by the statute, because it created a liability for all moneys or property received by the principal, "whether officially as purser or otherwise," and that it was not voluntarily given, says: "It [the bond] was demanded of the party upon the peril of losing his office; it was extorted under color of office against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the government has a right by color of his office to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law."

In *Hawes v. Marchant*, 1 Cur. 140, Mr. Justice Curtis, in considering this case and others cited from the lower courts to the same effect, says: "The rule which avoids such

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bonds rests upon the want of authority in the public officer to take them, and upon the policy of guarding the citizen against oppression by the illegal exercise of official power. It is well stated by Sewall, J., in *Churchill v. Perkins*, 5 Mass. 541, that when the plaintiff demands the fruit of an obligation obtained *colore officii*, it must be shown that the demand is justified by some authority of the officer, otherwise it is against sound policy, and is void by the principles of common law. By *colore officii*, however, must be understood some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given. If all parties voluntarily consent to enter into the bond, and the departure from the precise requisitions of the statute is made by mistake, or accident, and without any design to compel the obligees to enter into an undertaking not required by law, the bond is not invalid, simply because it contains something which the statute does not authorize."

Upon these authorities, and particularly the case of *U. S. v. Tingey*, it must be held that these pleas are a good defense to the action. The demurrer to them is therefore disallowed.

The demurrer to the fifth plea is also overruled. In *U. S. v. Thomas*, 15 Wall. 337, the supreme court, in the language of the syllabus, held that "a receiver of public money, under bond to keep it safely and pay it when required, is not bound to render the money at all events, but is excused if prevented from doing so by the act of God or the public enemy, without any neglect or fault on his part." In delivering the opinion of the court, Mr. Justice Bradley, after admitting the law to be that the "performance of an express contract is not executed by reason of anything occurring after the contract was made, though unforeseen by the contracting party and though beyond his control," makes a distinction "between an absolute agreement to do a thing and a condition to do the same thing inserted in a bond;" saying that "in the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or an overruling

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necessity;" citing Co. Lit. 206 (a); 2 Bl. Cqm. 340, 341; and concludes: "We think that the case is within the law as laid down by Lord Coke, and that the receiver, and especially his sureties, are entitled to the benefit of it; and that no rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part."

Certainly, according to the facts stated in this plea, this sum of money was lost or destroyed by an overruling necessity—the act of God—without fault or neglect on the part of Logan, and this brings the case within the ruling of the supreme court.

There must be judgment on the demurrers for the defendant.

GEORGE T. MARYE v. MARK STROUSE.

CIRCUIT COURT, DISTRICT OF NEVADA.

JANUARY 20, 1880.

1. AGENT.—An agent to buy can not be the seller.
2. BROKER'S CONTRACT.—An ordinary broker's contract for the purchase of mining stock, each share of which has an independent value, is not an entire contract.
3. SAME—CUSTOM.—A custom of charging customers an arbitrary sum for telegrams, usually much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should appear that both parties knew of it.
4. ACCOUNT STATED—BROKER'S PASS-BOOK.—Under the circumstances of this case, the balances struck in a "broker's pass-book:" *Held*, accounts stated.
5. SAME—INTEREST—APPROPRIATION.—Where a statute does no more than prohibit a recovery of interest in excess of ten per cent., when the contract is not in writing, but does not otherwise make the rate of interest unlawful, interest in excess of that rate may be included in an account stated; and money paid on account by the debtor may be applied to the payment of such interest by the creditor in the absence of any appropriation by the debtor.
6. MOTION—APPEARANCE.—A general appearance and consenting to a continuance is a waiver of irregularity in the notice.
7. INTEREST—ACCOUNT STATED.—An account stated is a new promise, and not a promise to pay any particular item that went into it.

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8. **FINDINGS OF FACT.**—After a general finding of fact, judgment thereon and the lapse of a term, special findings can not be added to or substituted for the general finding.
9. **SAME.**—A circuit court is not bound to make a special finding.
10. **BILL OF EXCEPTIONS.**—Notwithstanding the rule of court requiring a bill of exceptions to be drawn up within ten days after the trial, a case may be excepted from its operation when it is just to do so.

Before HILLYER, District Judge.

THE facts are stated in the opinion.

Kirkpatrick & Stephens, and Lewis & Deal, for the plaintiff.

Jonas Seely and B. C. Whitman, for the defendant.

HILLYER, J. This is an action to recover a balance alleged to be due upon a mining stock account. The complaint alleges the purchase, upon defendant's request, of a large amount of mining stocks; the expenditure of money for telegrams in connection with the buying and selling of the stocks; the advances of money on purchases, and the agreement of defendant to pay interest thereon at the rate of two per cent. per month. It also contains a number of counts upon accounts stated.

The answer puts in issue the purchase of five hundred shares of Franklin stock at three dollars per share; denies the correctness of the charges for telegrams, and any agreement to pay interest at the rate of two per cent. per month.

These are the only issues raised. The facts bearing upon each point can be best stated as it is decided, both for convenience and to avoid repetition. The facts in regard to the purchase of the Franklin stock are that the defendant requested the plaintiff's assignors, Frankel & Block, stock brokers, to buy for him five hundred shares of Franklin at a limit of three dollars per share. Frankel & Block purchased in the San Francisco stock board, next day, in the usual way, one hundred and twenty-five shares of Franklin, that being all that could be obtained at three dollars per share. At the same time, Frankel, one of the members of the firm, being a large owner of Franklin stock, turned over to Frankel & Block, for the purpose of filling the de-

defendant's order, three hundred and seventy-five shares of Franklin at three dollars per share, which were then applied by the firm to that purpose, and were charged to the defendant with the usual commissions and telegrams. The defendant never received the stock into possession, and never assented to this mode of filling his order, nor did he know it had been so filled, until about the time of bringing this suit.

The rule of law applicable to this state of facts is settled. An agent employed to buy can not become the seller, in the absence of his principal's assent, given upon full knowledge of the facts. Frankel & Block, as agents of Strouse to purchase, could not be the sellers. It is not claimed that there was any fraud in fact here, but evidence establishing the transfer of the stock to have been *bona fide*, and for a fair price, is unavailing. The inquiry does not reach the question whether there was or was not fraud in fact. It stops when it is ascertained that the agent was both buyer and seller. The law then declares the sale invalid, if the principal elect to so consider it, not because all sales so made are in fact fraudulent, but because it will not permit any trustee or agent to purchase on account of another that which he sells on account of himself. It does not permit the agent to be led into temptation by an act which raises a conflict between his integrity and his self-interest.

The supreme court of the United States announce this doctrine in very strong terms and with unanimity in *Michoud v. Girod*, 4 How. 503. The current of authority in England, as well as here, is all the same way. (4 Kent Com., 7th ed., 475; *Conkey v. Bond*, 34 Barb. 276.) The manner in which the stock passed from Frankel to Frankel & Block, and from them to Strouse, does not, in my judgment, essentially alter the case.

The fact that an account may have been stated between the defendant and Frankel & Block, in which this item of five hundred shares of Franklin was included, does not bind the defendant if he stated the account in ignorance of the fact. It appears that Frankel & Block never informed the

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defendant how the purchase had been made, and that the defendant did not in fact know of it until at or about the time of bringing this suit. The charge in the account, which was rendered to defendant, being for five hundred shares of Franklin at three dollars per share, gave him no information in regard to the person from whom the stock was purchased. The charge was for the quantity, and for a price within the limit of his order, and he may, and naturally would, have supposed it had been filled in the regular way. There was nothing to put him on inquiry, and he may now open the account for fraud, actual or constructive. So any payments the defendant may have made in ignorance of the facts can not be binding upon him, however appropriated, so as to prevent him from avoiding the transaction when he discovers the truth.

So far, then, as the three hundred and seventy-five shares are concerned, it seems clear that there is no liability on the defendant's part. But that he is properly chargeable with the one hundred and twenty-five shares which were regularly purchased in the board has hardly been seriously controverted. It was suggested, however, rather than argued, that the order for five hundred shares might and ought to be regarded as an entire contract, and that the defendant was not bound to take less than the whole five hundred shares. A sufficient answer to this position is that upon receiving the defendant's order to buy five hundred shares at a limit of three dollars, the undertaking of Frankel & Block, as brokers, was not to deliver the whole absolutely, but to buy so much as could be bought in the regular way below or at the limit. Moreover, there are no circumstances in this case showing, or tending to show, that the defendant regarded the purchase of the whole number of shares as essential to the value of a part. An ordinary broker's contract, for the buying of stock, each share of which has a distinct and independent value, can not be regarded as entire. The result upon this stock transaction is that the defendant is entitled to a credit for three hundred and seventy-five shares at three dollars per share, for commissions, and for interest thereon at the rate of two per cent. per month from

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September 28, 1874, down to the — day of —, 187—, and at ten per cent. per annum thereafter, so long as these rates have been charged against him in the account sued on.

The charges for telegrams were made in this way: Frankel & Block were in the habit of receiving orders daily for the purchase and sale of mining stocks. It often happened that a number of orders would be sent to San Francisco in one dispatch. In such case the practice was to charge each customer having an order therein seventy-five cents (that being the proper charge for a single telegram of ten words), although such customer's proportion of the actual cost was often, if not always, much less. Sometimes a single order would be sent for one customer, and then the actual cost of the telegram was charged. But how often this may have been done in defendant's case nowhere appears. No effort was made to keep an account of the sums actually paid out for telegrams about his business. The plaintiffs defend these charges on the ground that they are in accordance with an established custom of mining stock brokers. The testimony fails to bring knowledge of this custom, if any, home to Strouse. He never agreed to the charges, nor did Frankel & Block ever inform him of their character. He himself denies any knowledge of the custom, if it be a custom.

I think, also, that the testimony fails to show that the alleged custom had existed so long and was so generally known that the defendant ought to be presumed to have had knowledge of it and to have contracted with reference to it. The only evidence on this point is that of Mr. Frankel. In answer to the question whether this mode of charging "was a custom among the brokers and was well known," his answer is: "I tell everybody; make no bones about it." Again he answers: "It (the mode of charging) is well known; we don't make any bones about it—tell everybody." This shows that there was nothing clandestine about the charges, but does not show a certain and uniform custom among brokers which was known to both parties. A custom or usage, like this of charging customers in addition to commissions, not merely the actual cost of telegrams, but an

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arbitrary sum ordinarily much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should also appear that both parties had knowledge of it. Strouse says he expected to pay the actual cost of the telegrams about his business, but nothing more. There is, however, no proof showing what the real cost was. It being conceded that the charge is excessive unless supported by custom, the burden of showing what the real cost of telegrams was is on the plaintiff. But this has not been done, and the charge must stand or fall as a whole. I do not think it can be sustained upon the ground of custom.

Nor do I think that in reference to these charges the defendant has lost his right to object to them because he may have stated an account including them, or because payments made by him may have been appropriated by Frankel & Block to their payment. For this reason: The account as rendered to defendant contained the usual charge of the telegraph company for a dispatch of ten words or less, viz., seventy-five cents, and while the charge was false in fact, it would appear to the defendant to be true, so long as he remained ignorant of the broker's habit of charging. Until this became known to him there was nothing on the face of the account calling for objection by him. As to usage see *Renner v. Bank of Columbia*, 9 Wheat. 581; *Bowling v. Harrison*, 6 How. 248; *Pierpont v. Fowle*, 2 Woodb. & M. 23.

The only other portion of the account objected to by the defendant consists of the various charges for interest, at the rate of two per cent. per month, which he asserts are illegal, because no agreement in writing has ever been made to pay that rate. The plaintiff claims that all items of interest accruing prior to August 1, 1875, are included in a number of accounts stated, contained in a book in evidence called a "broker's pass-book;" and that since, under the law of this state, there is nothing illegal in a verbal agreement to pay interest at the rate charged, an account stated may lawfully be settled by the parties with items of interest at that rate entering into the balance struck and agreed to.

A statute of Nevada provides that "when there is no ex-

press contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum for all moneys." "Parties may agree, in writing, for the payment of any rate of interest whatever on money due or to become due." After judgment the original claim bears interest at the contract rate. There is nothing anywhere in the statute prohibiting persons from paying or receiving any rate of interest they choose. The only effect of the law is to prevent a recovery by suit of more than ten per cent. per annum when there is no agreement in writing. Properly speaking, two per cent. per month is not an illegal rate of interest in Nevada. If parties see fit to contract in writing, any rate so fixed can be recovered, but if the agreement is not reduced to writing they can not have the aid of the courts in enforcing it when the debtor refuses to abide by the verbal agreement. In such case, however, the agreement being fair and perfectly understood by the party charged, such interest may be included in the balance agreed to upon stating an account. There is nothing in that opposed to good morals or to the policy of the law in this state. And since the stating of the account alters the nature of the debt and amounts to a new promise (2 Greenl. sec. 127), and it is not necessary to prove the items of the account, but simply the assent, express or implied, of the debtor to the balance stated, a recovery may be had upon such an account unless it is successfully impeached for fraud or mistake.

Under the circumstances of this case, it appears to me that the balances struck in the "broker's pass-book" must be regarded, upon settled principles of law, as accounts stated. The book is kept for the express purpose of showing the customer how his account stands. It has on the debit side charges against Strouse for stocks bought, commissions, telegrams, assessments, and interest. On the credit side appear the proceeds of stocks sold, money paid in on account, and dividends collected. The course of business in the broker's office was to balance all stock accounts at the end of each month. This balance was carried forward as the first item of the next month's account. Interest

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on all advances during the month, as well as on the balance brought forward from the preceding month, was charged at the rate of two per cent. per month at the expiration of each month, and went into the balance struck. The pass-book is a copy of the broker's ledger. Whenever it was brought in by the defendant it was written up by copying into it the entries from the ledger and then returned to him, he having at all other times possession of the book. The first balance was struck August 31, 1874, and the last July 31, 1875. Every account and every balance made contains a charge for interest at the rate of two per cent. per month. In charging the item for interest it is not stated to be at the rate of two per cent., but the amount shows that to have been the rate. No objection was ever made by the defendant to this, or any other portion of this account, until the beginning of this suit in November, 1877. It thus appears that he retained the last account more than a year without objection. This warrants fully the presumption that he acquiesced in the accounts, and it is unnecessary that he should have given an express assent. (*Wiggins v. Burkham*, 10 Wall. 129.)

The defendant, however, says that acquiescence ought not to be presumed, because he did not, in fact, know what rate of interest was charged to him in his accounts. It is, perhaps, a sufficient answer to this to say, that having been in the receipt of these monthly accounts for a year, if he did not know he should have known; that he was bound to examine them enough to discover what a very slight examination would have disclosed, upon the principle that a party is chargeable with knowledge when the means of knowledge are within his reach. (*Ogden v. Astor*, 4 Sandf. 332.) It would, indeed, be wrong to permit the defendant to lie by without objection, while his broker advanced large sums for him, upon the understanding that the rate of interest was to be as charged.

But there can be no reasonable doubt that Strouse did know and assent to the rate of interest as charged. His account was large, the interest charge alone, some months,

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amounting to over eight hundred dollars. The account for July, 1875, is as follows:

July 1. To balance	\$39,695 73
10. Assessment 200 Daney	100 00
30. 30 Ophir, \$57	1,710 00
Commissions and Telegrams	18 60
31. Interest	817 50

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July 12. By Dividend 50 Con. Virginia.....	\$ 500 00
31. Balance	41,841 83

It is impossible to believe that any business man could receive so simple an account and not know from it the rate of interest he was charged. The testimony shows that these accounts were rendered for the purpose of informing the defendant how his account stood. The dealings between the parties extended through a period of over two years, during all of which time interest was charged monthly at two per cent. It appears also that at this time the bank rate, as well as the broker's rate, in Virginia City, was two per cent. per month, and that the defendant did business with nearly or quite every broker and banker in the city. I find, then, that Strouse knew the rate of interest charged against him in his account. There was no mistake or fraud about it. Having this knowledge, he not only receives and retains accounts without objection, but even pays them. The method of keeping and rendering accounts continued so long as to become a regular course of dealing between the parties. Under such circumstances, the authorities are clear that an account stated can not be opened because an item of interest which went into it could not have been recovered by suit, provided such item is not illegal. (*Backus v. Minor*, 3 Cal. 231; *Young v. Hill*, 67 N. Y. 163; *Bainbridge v. Wilcocks*, Bald. 536; *Freeland v. Herron*, 7 Cranch, 147.)

After July 31, 1875, no accounts were stated between the parties. The defendant did not bring his book in to have it written up after August, 1875. The balance against him July 31, was forty-one thousand eight hundred and forty-

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one dollars and eighty-three cents. Dealings still continued between the parties as before, for a long time, the last item on the debit side bearing date December 24, 1876, and the last on the credit side August 14, 1877. After August 1, 1875, the account was kept on plaintiff's books as before. Monthly balances were struck, embracing current charges and interest, as well on the balance from the preceding month as on current advances.

Credits arising from sales of stock, dividends, or cash were set opposite these charges, and deducted from the debit side, the balance so struck being carried forward and making the first item of the next monthly account. The defendant paid in all moneys generally on account, never making any application of them, but they were applied as paid in or received by the brokers to the payment of all back indebtedness, including the interest at two per cent., the application being made to that account which had accrued first in point of time.

The right of the plaintiffs to apply the payments so made to that portion of the account which is for interest at two per cent. per month is denied. The argument is that the charge for interest is illegal, and while the creditor, in this case, had a right to apply the payments, his right is confined to demands which are legal, and can be enforced. Upon this point the law seems to be entirely settled. So far as I can discover there is no conflict of authority. The established rule is that when a creditor has two demands, one of which is lawful and the other unlawful—that is to say, arising out of some contract prohibited by law—the creditor can apply an unappropriated payment only to the lawful demand. (*Rohan v. Hanson*, 11 Cush. 44; *Caldwell v. Wentworth*, 14 N. H. 431; *Bancroft v. Dumas*, 21 Vt. 456.)

But many demands are lawful which can not be recovered by a suit at law, and to the payment of all such demands the creditor may lawfully apply money paid to him by his debtor whenever the debtor fails to make any appropriation. Thus a debt barred by the statute of limitations may be liquidated in preference to debts not

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barred. (*Ramsay v. Wasner*, 97 Mass. 8; *Mills v. Fowkes*, 5 Bing. (N. C.) 455; *Williams v. Griffith*, 5 Mee. & W. 300.) So in cases where no recovery can be had, because the promise is not in writing as required by the statute of frauds. (*Haynes v. Nice*, 100 Mass. 327; *Murphy v. Webber*, 61 Me. 478.)

In like manner where a statute did not prohibit the sale of liquor, but enacted "that no person should maintain any action for sums for or on account of spirituous liquors," it was held that the seller might apply an unappropriated payment to the account for liquors, and sue for other articles. (*Philpott v. Jones*, 2 Ad. & E. 41; *Cruickshanks v. Rose*, 1 Moo. & R. 100.) So where the creditor had an equitable demand arising out of partnership relations, he was allowed to apply payments made generally to the equitable claim, and sue at law for his legal demand. (*Bosanquet v. Wray*, 6 Taunt. 597.) These cases illustrate the distinction which is made between contracts "which the law simply declines to enforce, and those which it directly prohibits." (*Philips v. Moses*, 65 Me. 70.)

Payments may be applied by a creditor to demands not recoverable at law, when no statute prohibits the contract, but simply denies a remedy to enforce them. In such cases the contract is not illegal, and the money, if voluntarily paid, can not be recovered back. But the right does not extend to contracts which are "prohibited by law under heavy penal forfeitures and payments which may at once be recovered back because illegal." So held where a payment had been applied to a grossly usurious contract which could not have been enforced, and the law gave the debtor a right to recover back three times the amount paid for usurious interest. (*Rohan v. Hanson*, *supra*.)

That, under the statute of Nevada, an agreement to pay two per cent. per month interest is lawful, although not in writing, and that such interest is a proper item to enter into an account stated, has just been decided. It is equally clear that under the same statute it is perfectly legal to pay that rate without any written agreement to do so. Money so paid can not be recovered back, if the payment

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was voluntary. In the recent case of *Marvin v. Mandel*, 125 Mass. 562, the decision was upon a statute of that state, which allows parties to contract in writing for any rate of interest; but unless the contract is in writing, no more than six per cent. can be recovered by action; and upon this it was held that without a written contract it was lawful to pay and receive a greater rate than six per cent., and that when voluntarily paid it could not be recovered back.

In this case the last payment was made some months before any controversy arose about the charge for interest, and there is but one conclusion possible upon all the authorities, and it is that the creditors had a lawful right to apply the unappropriated payments of Strouse to extinguish the oldest items of the account, including those for interest at the rate of two per cent. per month. Had the creditors done nothing more than to set the items of credit opposite the debits, this of itself would have amounted to an application of them to the payment of those debts. (*Clayton's case*, 1 Meriv. 608; *Willard Eq.* 102.) And in the absence of any specific application by either party the law would apply the credits as Frankel & Block did, to the payment of the items and balances "according to the priority of time." (*Id.*; *U. S. v. Kirkpatrick*, 9 Wheat. 720.)

My conclusion upon the whole case is that there must be a general finding of facts for the plaintiff, the amount of the judgment to be ascertained in accordance with the foregoing opinion.

Decision on motion for a new trial, July 5, 1880:

This cause was tried at the last term of this court without the intervention of a jury. On the twentieth day of January, 1880, the court filed a general finding of fact in favor of the plaintiff, upon which judgment was entered the same day. A stay of proceedings for twenty days was granted to enable the defendant to file a bill of exceptions or take such action as he should be advised. No bill of exceptions was prepared within the time allowed, nor at the term in which judgment was entered. No request for a

special finding of facts was made at that term. Rule 23 of this court requires all notices of motions for new trials to be given within ten days after the rendition of the decision sought to be set aside. On the twenty-eighth of January, 1880, B. C. Whitman, an attorney of this court, made and served a notice of motion for a new trial. Prior to that date, and at that time the only attorney of record for defendant, had been and was Jonas Seely. On February 11, 1880, a further order was made staying execution until a decision upon the motion for a new trial. The March term of this court began on the fifteenth of that month. By rule 25 of this court, a party is not required to prepare his bill of exceptions at the trial, but within ten days thereafter the bill must be drawn up, filed, and served. At the trial the exceptions taken, under the rule, are to be reduced to writing and delivered to the judge. On the ninth of April, 1880, at the time the motion for a new trial came up for argument, the defendant's attorneys presented and asked the judge to allow and seal as correct a document entitled a "bill of exceptions." They also, at the same time, presented a paper called "special finding of facts" and asked that it be signed and made a part of the record.

The motion for a new trial came up first regularly for hearing on the first Monday of March, and at that time the plaintiff appeared, and, without any objection to the notice, consented to a continuance. Admitting, what is doubtless correct, that the notice was insufficient, I still am of the opinion that this general appearance on the part of plaintiff must be considered a waiver of the want [of due notice. In its nature it resembles the summons issued at the commencement of the suit, and a general appearance is a waiver of all irregularities in the service of a summons. The motion being thus now properly before the court, the grounds of it are to be considered.

At the trial the three principal questions discussed were: 1. Whether the pass-book, under the circumstances, amounted to an account stated; 2. Whether there had been such an appropriation of payments as closed inquiry in reference to the rate of interest charged to defendant by

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Frankel & Block; 3. Whether the contract for the five hundred shares of Franklin stock was an entire contract.

Upon these points I have considered everything said in argument and put into briefs. My opinion on none of them is changed. An argument now urged by defendant deserves notice, because it was not made before. It is this: The statute of Nevada does not allow a recovery of interest at a greater rate than ten per cent. per annum, unless the agreement therefor is in writing. The stated accounts contain items for interest at a greater rate. The promise implied from a statement of accounts is a verbal promise, and hence can not be enforced for the interest.

The answer to this argument is, in my judgment, this: The account stated is a new contract between the parties. A balance is found against one, and he agrees to pay that balance, not the items which may have entered into it. No inquiry is permitted in regard to the items unless there has been fraud or a clear mistake, and neither of these is claimed in this case. The promise, then, implied from the account stated is a new one, to pay a definitely ascertained amount and is in no just sense an agreement to pay interest at two per cent. per month.

It is also now argued that the following errors of law occurred at the trial: After the witness Frankel had stated that the rate of interest charged to defendant in the account was two per cent. per month, he was asked by counsel for plaintiff: "Was that the usual rate of interest among brokers and bankers in Virginia?" Counsel for defendant objected on the ground that it called for incompetent testimony. The objection was overruled and defendant excepted. The witness then answered: "I had to pay that rate myself." No objection was made to the answer, nor any motion to strike it out. The answer was not responsive to the question, and did not tend to prove a custom. It would have been stricken out on motion. The proof of custom sought to be made would have been material only as tending to show that the defendant knew the rate he was charged, and for that purpose I still think it would have

been proper. But if error, it is plain the defendant was in no way injured by allowing the question to be answered.

The other exceptions noticed in the proposed bill of exceptions do not appear to have been in fact taken. Neither the judge's nor reporter's notes, nor the minutes of the court, nor any writing pursuant to the twenty-fifth rule of this court, show any such exceptions to have been made.

It follows that the motion for a new trial must be overruled.

Two questions of considerable importance as affecting the practice of this court remain. The first is, whether after a general finding of facts, judgment thereon and the lapse of a term of court, special findings can now be substituted for or added to the general finding. Counsel insist that this court was bound to make a special finding of facts, because a statute of Nevada requires the judge who tries a cause without a jury to state the facts and conclusions of law separately (Comp. L., sec. 1243), which statute, it is said, must be considered as adopted by the act of congress conforming the practice and mode of procedure in the United States courts to that in the state courts. It has always been held in this court that all such matters as have been regulated by congress expressly are to be taken as the rule of action in case of conflict with a state statute. But however this may be, the point in question has been settled by the supreme court, and it is idle to discuss it further. The circuit court is not required to make a special finding, even when requested to do so. (*Insurance Co. v. Folsom*, 18 Wall. 249.) The act of March 3, 1865, R. S., sec. 649, allows the finding to be either general or special.

If an application for special findings had been made at the trial, it would doubtless have been granted, but I do not see how, consistently with the rules of law governing amendments of judgments and records, such a finding of facts can now be made and filed as part of the record in this case. In cases in which amendments of the record have been permitted, it has been done to supply some defect, and to conform it with the truth or the real intention of the court. But in the present case, there is no defect in

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the record. It speaks the truth, and is exactly that which the court intended it should be. The general finding of the issues of fact in favor of the plaintiff satisfies the requirements of section 649, and was made and signed by the judge and intended to be a general as distinguished from a special finding.

Here, then, there is no defect, no mistake, no error; "the record conforms to and exhibits the truth." A special finding of facts, if signed and allowed to be filed now, would contradict the record. The judgment of this court was based upon a general, not a special verdict. There is nothing in this record by which the amendment asked can be made. In *Insurance Co. v. Boon*, 5 Otto, 117, there was no technical finding of facts, general or special, and there was therefore a defect in the record. The opinion read on the decision and filed contained the statement of facts upon which the judgment was based. "All that was wanted to make it a sufficient special finding," say the court, "was that it was not entitled 'finding of facts.'" I see nothing in that case to warrant the course asked in this. That was the correction of a defect in the record in conformity to the truth, by the aid of the opinion of the judge; this would be a change of the record, not in accordance with, but in contradiction of the truth. The prayer that special findings of fact be signed and filed *nunc pro tunc* as of the November term must be denied.

The other question is whether a bill of exceptions can now properly be sealed and filed for the first time. Notwithstanding the rule of this court, prescribing the time within which bills of exception must be drawn up, it is undoubtedly within the power of the court to except a particular case from its operation whenever it is just to do so. (*U. S. v. Breitling*, 20 How. 252.) At the time judgment in this case was rendered, the defendant's attorney was absent in Colorado, and I am disposed, under all the circumstances, to allow a proper bill of exceptions at this time. But one exception was actually taken and saved at the trial, which is the one before noticed. Only such as are so saved can be included in a bill of exceptions. (Id.) During the trial

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the plaintiffs were allowed to amend by adding to their complaint a number of counts on accounts stated. These amendments are all put into the bill as proposed by defendant, but are not properly there. The amendments are all matters of record, and no bill of exception is needed to bring them on the record. The bill, as proposed, also contains a statement of all the testimony in the case. This can not avail as a special finding of facts. (*Norris v. Jackson*, 9 Wall. 125. Only so much of the evidence as is necessary to prove the exception ought to be included in the bill. A bill embracing the exception stated will, if desired, be sealed and filed.

JOHN H. BURKE v. JAMES C. FLOOD ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JANUARY 26, 1880.

1. REMOVAL OF CAUSES UNDER ACT OF 1875.—Under the first clause of the second section of the act of 1875, which reads, “in any suit of a civil nature * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit,” it is necessary, to authorize a removal, that all the parties on one side shall be citizens of different states from those on the other side of the controversy. But to determine the right of removal the parties may be transposed and arranged on opposite sides of the controversy according to their real interests, without regard to their formal position on the record as plaintiffs or defendants.
2. REMOVAL UNDER SECTION 637, R. S.—B., a citizen of California, filed his bill in equity as a stockholder therein against the C. V. M. Co., a California corporation, the P. W. L. & F. Co., also a California corporation; F., a citizen of California, and M. & F., citizens of Nevada, all the latter being stockholders and officers or agents of both corporations, for an account between said corporations, and between the P. W. L. & F. Co., and F., M. and F., and for a recovery from said defendants by the C. V. M. Co. of a large amount of profits on numerous contracts alleged to have been fraudulently made in pursuance of a conspiracy, through defendants, F., M., F. and O'B., acting as officers and agents of both corporations, and which profits came to the possession of F., M., F. and O'B., in dividends from P. W. L. & F. Co., the parties other than the corporations being copartners in business, and their acts complained of being their joint acts for their joint benefit as such copartners. The suit having

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been removed from a state court to the United States circuit court as to M. & F., citizens of Nevada, under section 639, R. S., on motion to remand: *Held*, that there could not be a final determination of the whole controversy as to M. & F. without the presence of the P. W. L. & F. Co. and F., and that for this reason the suit was not removable as to M. & F. under the provisions of said section.

Before SAWYER, Circuit Judge.

THE facts sufficiently appear in the opinion. On motion to remand.

S. W. Holladay and J. Trehane, for motion.

C. J. Hillyer and Hull McAllister, contra.

SAWYER, Circuit Judge. This cause having been removed from the state court on the petition of all the defendants under the first clause of section 2 of the act of 1875, and by the defendants, Mackay and Fair, as to them, under the act of 1866, as carried into section 639 of the R. S., second subdivision, the complainant moved to remand it to the state court, on the ground, that this court has no jurisdiction, and that the case is not removable under either act. Upon the principle adopted in the *Sewing Machine cases*, 18 Wall. 553, which arose under the act of 1867, and under the decision of the supreme court, made at the present term, in *Meyer et al. v. The Delaware Railroad Construction Company*, 100 U. S. 457, which arose under the first clause of section 2 of the act of 1875, and presented the point, I regard it as settled by that court, that to remove a case under the latter provision it is necessary that all of the persons constituting the party on one side of the controversy must be citizens of different states from those on the other side. But for the purpose of removal, the parties may be transposed and arranged in their proper positions with reference to their interest in the controversy, without regard to their formal position as plaintiffs or defendants on the record. This is the rule as I understand it to be laid down in the latter case, upon mature consideration after a re-argument in which any attorney feeling an interest in the question, whether of counsel in the case or not, was invited

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to participate as *amicus curiæ*. In this court, this will be regarded by me as the settled construction of the section until otherwise ruled by the supreme court.* In this case, even after transposing the Consolidated Virginia Mining Company, defendant, to the side of the complainant, Burke, we have still two citizens of California on one side of the controversy, and two citizens of the same state, California, and two citizens of Nevada on the other. The persons composing the party on one side of the controversy, therefore, not being all citizens of different states from the party on the other, the case was not removable under the construction established, and it must be remanded.

Was the case properly removed as to defendants, Mackay and Fair, under the act of 1866, as carried into the R. S. in section 639? The complainant, Burke, a citizen of California, files his bill against the Consolidated Virginia Mining Company and the Pacific Wood, Lumber, and Flume Company, both corporations organized under the laws of California, J. C. Flood, a citizen of California, and John W. Mackay and James G. Fair, citizens of Nevada. He alleges in substance, among other things, that he is a stockholder in the Consolidated Virginia Mining Company; that he has made a demand upon that corporation to bring the suit, which it declined to do; whereupon he brings it himself as a stockholder on his own behalf, and on behalf of all other stockholders who choose to come in and share in the expense of this prosecution, making the corporation a defendant. He further alleges that defendants, Flood, Mackay, and Fair, and W. S. O'Brien, were either directors, or controlled the directors, of the defendant, the Consolidated Virginia Mining Company; that they fraudulently conspired together to injure the Consolidated Virginia Mining Company, and to that end organized the corporation defendant, the Pacific Wood, Lumber and Flume Company, of which they were the stockholders and officers, or controlled the officers; that through the defendants, Flood,

*See *Ayers v. Chicago*, 101 U. S. 184, since decided, affirming *Meyer v. Delaware R. R. Co.*; *Pac. Railroad v. Ketchum*, 101 U. S. 298, 299; *Barney v. Latham*, 103 U. S. 211; and *Blake v. McKim*, 103 U. S. 337.

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Mackay, and Fair, and W. S. O'Brien, since deceased, acting as officers or agents of both corporations, or through officers controlled by them, the Consolidated Virginia Mining Company entered into large contracts with the Pacific Wood, Lumber, and Flume Company, whereby the latter agreed to supply and did supply to the former large quantities of wood and lumber at prices which were in fact paid, larger than the supplies could have been purchased for from other parties, and that the said Pacific Wood, Lumber, and Flume Company thereby received profits on said contracts to the amount of four million dollars in excess of what it should have received, which profits came to the possession of said O'Brien and defendants, Flood, Mackay, and Fair, through said Pacific Wood, Lumber, and Flume Company, as the stockholders of said corporation. He also alleges that during the whole period embracing the transactions set out, said Flood, O'Brien, Mackay, and Fair were partners in business, and that their acts complained of were the joint acts of said partners, and performed for their joint benefit as members of said copartnership. He then asks that said contracts be declared void, and that an account be taken between the said Consolidated Virginia Mining Company on one side, and the said Flood, Mackay, and Fair and the Pacific Wood, Lumber, and Flume Company on the other, of the moneys paid by the Consolidated Virginia Mining Company to the Pacific Wood, Lumber, and Flume Company, and received by the latter under said contracts, and of the profits resulting therefrom realized by said defendants or either of them, or by said O'Brien, deceased, and that on said accounting the defendants be decreed to repay all said profits, moneys, etc., to the Consolidated Virginia Mining Company.

It will be seen that the remote parties are the complainant, Burke, as a stockholder of the Consolidated Virginia Mining Company, and Flood, Mackay, and Fair as stockholders of the Pacific Wood, Lumber, and Flume Company—indeed of both corporations. That the immediate parties to the contracts sought to be examined and set aside, and an account of whose profits is sought to be taken, are the

Consolidated Virginia Mining Company and the Pacific Wood, Lumber, and Flume Company, and that the moneys sought to be recovered are moneys paid by the first-named corporation to the latter upon the contracts set out, and paid by the latter in dividends to the said defendants, Flood, Mackay, and Fair, and to said O'Brien. The primary and immediate parties to the transaction alleged are the two corporations. The rights and liabilities of the complainant and the other defendants are secondary and derivative.

The provision of the R. S. under which the removal is had, so far as applicable, is, when a suit is by a citizen of the state wherein it is brought, "against a citizen of the same and a citizen of another state, it may be so removed as against said citizen of another state, upon the petition of such defendant * * * if so far as it relates to him it * * * is a suit in which there can be a final determination of the controversy so far as it concerns him, without the presence of the other defendants as parties in the case."

Upon the allegations of this bill, can there be a final determination of the controversy, so far as it concerns Mackay and Fair, without the presence of the Pacific Wood, Lumber, and Flume Company, or without the presence of Flood? In my judgment there can not. I do not see how a final account can be taken between the Consolidated Virginia Mining Company and the Pacific Wood, Lumber, and Flume Company, as to the profits on the contracts between them set out, and then between the latter corporation as to the amount of said moneys paid by it to Flood, O'Brien, Mackay, and Fair, as copartners, without the presence as a party of either said corporation or said Flood or O'Brien. Certainly none could be taken that would bind said corporation, or Flood, or O'Brien, without their presence; and, therefore, none that could be final as to Mackay and Fair. If one suit can be successfully prosecuted against Mackay and Fair alone, and another against Flood and the Pacific Wood, Lumber, and Flume Company alone, then one can be prosecuted against each of said parties alone, and there might be in different states, and in five different courts, five different suits pending upon these same transactions, and five differ-

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ent accounts taken between the Consolidated Virginia Mining Company and the Pacific Wood, Lumber, and Flume Company, and another account between the latter corporation and Flood, O'Brien, Mackay, and Fair, in each of the five suits; and the result in no two of the suits in any respect agree. Could they all be final? If not, then no one would be final. It was stated on the argument, and it is a notorious fact daily reported in the newspapers, that there is in fact now pending in a state court by the same complainant, Burke, against the representatives of O'Brien, alone, a proceeding for an account of the same transactions, so that if this suit is also divided, there will in fact be pending three out of the five possible suits into which this litigation may be split up, and in three different courts. It is claimed by the complainant that the defendants are *tortfeasors*, and that each defendant is liable individually for all the moneys wrongfully received by the Pacific Wood, Lumber, and Flume Company from the other corporation, and paid to the other defendants as dividends; but I do not suppose that he claims that the Consolidated Virginia Mining Company is entitled to recover the whole from each of the five parties involved in the transaction. But in case of a suit against each, he would probably claim that he would be entitled to elect to take the largest sum found due upon the accounting in the several separate suits. Suppose in the five several suits brought, or that this suit is divided as proposed, and in the one against the Pacific Wood, Lumber, and Flume Company there should be a decree for complainant, and the accounting showed four millions as claimed in the bill to be the amount of profits to be paid to the Consolidated Virginia Mining Company, but that Mackay and Fair, in their half of the suit, or either of them, if sued alone, should succeed in defeating the claim altogether, and procure a decree on the merits in their favor; and, further, that the Pacific Wood, Lumber, and Flume Company should pay the claim, would it not be entitled to call upon Mackay and Fair to refund the amount actually wrongfully received by them in dividends? But the accounting between the Consolidated Virginia Mining Company and the Pacific Wood, Lumber, and Flume

Company, and between the latter and Mackay and Fair taken in the suit of *Burke v. The Pacific Wood, Lumber, and Flume Company*, would not be conclusive, for the reason that Mackay and Fair were not parties to it, and the whole would have to be gone over again, with perhaps an entirely different result. So, also, suppose Burke should not be able to satisfy his decree against the Pacific Wood, Lumber, and Flume Company and Flood, if the latter were a party to it, and should seek to enforce his judgment against Mackay and Fair, upon their personal liability as stockholders, under the statutes for their share of the decree, then Mackay and Fair would either be concluded by the judgment against the corporation for whose liability they are responsible as stockholders in a proceeding to which they were not parties, and for a claim which in suits against them individually they had defeated, or else there would have to be another accounting. There would at all events have to be another accounting, to ascertain their share of the liability.

Again, it is alleged in the bill, that Flood, O'Brien, Mackay, and Fair, during all the time mentioned, were partners in business, and that all the transactions complained of as to them were on their joint account as such copartners. If so, all moneys received by them on the transactions as alleged were partnership funds—partnership assets—and must be accounted for as such. Under these allegations, they are not merely joint, or joint and several *tortfeasors*. The act is a firm act—an act of a single indivisible commercial entity. The moneys received as dividends from the corporation, and which are sought to be recovered, were partnership funds. An account which shall be binding on the parties can not be taken of partnership transactions without the presence of all the partners. Each member is individually liable, it is true, for all the obligations of the firm, but if he is compelled to pay the whole, he is entitled to contribution. Whatever the rule as to contribution may be as between mere joint or joint and several *tortfeasors*—and there appears to be some conflict of authority as to them (see *Trustees and Tort-feasors*, 1 Am. Law Rev., N. S., 36)—I take it there can be no doubt that a partner is entitled to

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contribution from his copartner when he has paid more than his share of the firm liabilities, even though the liabilities grow out of a tortious act of the firm. When money has come into the hands of a partnership on a partnership transaction, however unlawfully or wrongfully acquired as between the members, it is partnership assets, and must be accounted for as such as between themselves. (*McBlair v. Gibbes*, 17 How. 237.) In this case the supreme court, approvingly quoting from a prior case, says: "Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of parliament has been violated? The answer is, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do as between the parties. The difference (he observes) between enforcing illegal contracts and asserting title to the money which has arisen from them, is distinctly taken in *Tenant v. Elliot* and *Farmer v. Russell*, and recognized by Sir William Grant in *Thompson v. Thompson*."

Also in *Brooks v. Martin*, 2 Wall. 70, 81, it is held that "after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners had passed into other forms—the results of the contemplated operation completed—a partner in whose hands the profits are can not refuse to account for and divide them on the ground of the illegal character of the original contract."

The principle stated in these cases covers this case. Upon the allegations of the bill these contracts set out between the two corporations were fulfilled, the consideration paid over, and the original transactions closed. The profits accrued thereupon, according to the allegations of the bill, came to the firm of Flood, O'Brien, Mackay, and Fair, as partners, and, however obtained, they were upon that hypothesis partnership assets, and as between them must be so treated. Should this suit be divided, then, and one part proceed in one court, and another in a different court, or should there be five separate suits, and Mackay and Fair defeat the com-

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plainant, yet if the complainant should recover in some of the other suits, and the defendant therein be compelled to pay the decree, Mackay and Fair would be undoubtedly liable to be called upon in another suit to contribute, and the whole litigation would have to be gone over again. It must be borne in mind that this is not an action at law against mere *tortfeasors* to recover damages for some tortious act, but a suit in equity to have an account of specific moneys paid to a corporation on contracts fully executed, alleged to be illegal, and by it distributed to its stockholders in dividends.

But suppose it turns out that Flood, O'Brien, Mackay, and Fair were not partners; that their acts were not partnership acts, and that the dividends received were not partnership assets, I do not perceive that it would affect the question as to the *finality* of the determination within the meaning of the statute. There is nothing necessarily, or essentially fraudulent or morally wrong in the mere fact that Flood, O'Brien, Mackay, and Fair owned stock, or even a controlling amount of stock in, and are officers of, the two corporations; or that being such stockholders and officers, one corporation through their agency sells wood and lumber to the other. It may well be for the best interest of both corporations to enter into such transactions. The Consolidated Virginia Mining Company is not the only party wanting wood and lumber, and the Pacific Wood, Lumber, and Flume Company is a corporation organized and competent to sell wood and lumber to all who desire to purchase. It may have facilities for furnishing these articles of large and general consumption, which enables it to sell them at lower prices than they can be obtained for elsewhere. If that be the case, it would be to the advantage and interest of the other corporation to purchase from it, even though its officers and agents are also officers and agents of the other corporation. Should these parties, on the ground of the delicacy of their position, decline to purchase of the Pacific Wood, Lumber, and Flume Company on better terms, if better terms were offered, than could be obtained elsewhere, the complainant in this suit as a stock-

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holder in the Consolidated Virginia Mining Company would be very likely to complain: The position of Flood, O'Brien, Mackay, and Fair may be delicate, and their acts in it call for rigid scrutiny, but there is nothing necessarily fraudulent or morally wrong in it. These acts of purchase, however, are alleged to be at higher prices than others charged, and in pursuance of a conspiracy to injure the purchaser and to be in fact fraudulent. It is easy upon information and belief to charge conspiracy and fraud whereby enormous profits accrue to the alleged culpable parties; but it is quite a different matter to establish them by satisfactory proofs. As now presented, no answer even having been filed, the matters rest upon naked allegations upon information and belief. It is impossible to anticipate what may turn out in the proofs. It may possibly turn out in some legal aspect of the case that defendants may be adjudged to account, whether rightfully or not, under circumstances disclosing no actual fraud, and no moral delinquency at all. In such a case a right to contribution would certainly arise in favor of the party who is called upon to pay more than his share, even though there is no partnership between them. At all events various results may be reached in different suits and different courts, under different views, different management, or different proofs, and under various possible aspects there might well be reasonable ground to claim a right to contribution, and wherein a party might reasonably bring an action to enforce it, though he might fail in the action.

In such a case the finality of the determination, as to the party charged in the accounting who pays more than his share, does not depend upon the result of his action to compel a contribution, but upon whether he has reasonable ground in good faith to seek to compel a contribution, even though he may ultimately fail. For the purpose of this motion we can not look forward and determine absolutely whether a right of contribution will ultimately exist or not. If it can be seen that under any aspect of the case that may reasonably be presented, there may be reasonable ground to prosecute an action for contribution, then any determina-

tion as to an accounting in a proceeding where all of the parties interested are not present and bound by the determination, can not be regarded as a final determination as to those parties within the meaning of the statute authorizing the removal of the case. The fact of a liability to further litigation as between the parties to ultimately determine their rights as between themselves upon reasonable ground, is itself sufficient to render the determination not final as to Mackay and Fair, without reference to the ultimate result of such renewed litigation. I think I see a reasonable liability to such further litigation in various possible aspects that may be presented, whether the acts of Flood, O'Brien, Mackay, and Fair turn out to be partnership acts, and the moneys received by them from the corporation, partnership assets, or not. The court is not now called upon to determine the merits of this case, or the ultimate rights of these parties between themselves, but only to ascertain whether a decision of the branch of the suit between complainant and Mackay and Fair, without the presence of the other parties, is likely to be a final determination of the whole controversy as to them, so that there shall be no further ground to litigate their rights as to these same transactions with the other parties to them. Looking at the case from any point of view, then, it seems clear to me that there can not be a "final determination of the controversy" as to Mackay and Fair, or either of them, or as to anybody else, without the presence of the Pacific Wood, Lumber and Flume Company, Flood, and the representatives of O'Brien. Indeed, nothing would be finally determined as to any of the parties in a suit against a portion of the defendants.

I suppose the right of citizens of California to have their controversies among themselves adjudicated in the state courts is as absolute and indefeasible as that of a citizen of Nevada to have his controversy with a citizen of California adjudicated in the national courts. Indeed, in the state courts the jurisdiction is general and universal, while that of the national courts is limited to the cases expressly provided for and specially pointed out by the United States

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constitution and the laws of congress made in pursuance thereof; and the case must be clearly brought within the language of the national constitution and statutes, or the national courts can not assume jurisdiction. If a citizen of Nevada finds it for his interest to enter into such business relations with citizens of California, that his rights can not be separately determined, he does so at his own option, and while he enjoys the benefits of such relations, he also necessarily accepts the inconveniences incident to the relation; one of which is, that when his rights are so intermingled with those of his associates that they can not be separately finally determined, he may find it impracticable to appeal to the national courts, because he can not do so without the violation of the rights of other parties to litigate in the state courts equally sacred, and therefore lose the privilege which he otherwise would have to litigate them in the national courts. If this be the result, it is in consequence of his own voluntary action, and he can not expect congress or the courts to strain their authority in devising ways or pretexts for relieving him from the embarrassments incident to the relations which he himself has voluntarily assumed.

Upon the allegations of the bill, with my views of the case, I should not hesitate to sustain a demurrer to it for want of necessary or indispensable parties, had the defendants Flood and the Pacific Wood, Lumber and Flume Company been omitted, thus presenting the case in the position it would be in after removal to this court as to them by Mackay and Fair.

In my judgment, therefore, this is not a case that is authorized to be removed under section 639 of the R. S., and the removal was improperly made.

Upon the grounds stated, an order was made remanding the case to the state court, but the return of the record having been stayed for a limited time to enable counsel to determine what course they would pursue, a petition was filed on behalf of Mackay and Fair for a rehearing of the motion to remand as to them under section 639 of the R. S., in order to enable counsel to present another point not sug-

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gested or argued on the first hearing, and counsel have been heard on this petition.

The point which counsel desire to present is that the facts alleged in the bill do not present any ground for relief, and that upon the face of the bill there must be a final decree for the defendants Mackay and Fair; and this being so, they claim that a final decree should be made on the face of the bill itself, and that such decree would be a final determination of the controversy as to them, and the case should be retained to be disposed of on that ground.

Whether the bill states a good cause of action has not been argued; a rehearing being asked in order that it may be argued for the purpose of determining the jurisdictional question, and I shall therefore not express any opinion as to its sufficiency. But, assuming for the purposes of the petition for rehearing, that the court would hold upon argument the bill to be insufficient, and that there must be a decree for Mackay and Fair on that ground, the objections pointed out in deciding the other points already considered and determined would not be obviated. It would only be a determination of that branch of the particular action. It would not finally determine the rights of Mackay and Fair in the other branch of the action still pending against Flood and the Pacific Wood, Lumber, and Flume Company. It would not finally determine their rights in the whole controversy. The effect of a determination of the branch of the case against Mackay and Fair in their favor upon demurrer to the bill would be no greater than if determined in their favor after a final hearing on the evidence. Upon a removal as to Mackay and Fair only, under the act of 1866, the other branch of the same controversy, as against Flood and the Pacific Wood, Lumber, and Flume Company, would remain in the state court. Owing to differences of views, differences of proofs, or difference in the course of proceeding, different results may be reached in the different branches of the controversy pending in the state and national courts, and thereby the whole controversy, as we have seen, would not be finally determined. This court might be of opinion that the defendants Mackay and Fair

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are entitled to a final decree upon the face of the bill, while the state court, having jurisdiction of the other branch of the controversy, might determine that Flood and his co-defendant were not entitled to a decree upon the same bill, and under the same circumstances. Or the position of the courts might be reversed. We can not assume that the determinations of different courts would necessarily be the same. The very right to transfer at all is based upon the idea that the result in the national court may be different from that in the state court. The same might be true upon a final hearing upon the evidence, but the effect would be the same in either event, whether determined on demurrer or final hearing. If Mackay and Fair should succeed in wholly defeating the complainant in their branch of the case and of the controversy, either on demurrer or a hearing, and the complainant should succeed as to Flood and his co-defendant, then, under the views I have taken, Mackay and Fair would be immediately liable to be called upon to contribute either on his personal liability to complainant as a stockholder, or in a suit by the Pacific Wood, Lumber, and Flume Company, or at the suit of his copartner or associate Flood, and the whole litigation have to be gone over again. The whole controversy would not be finally determined. If, on the other hand, Flood and his co-defendant should succeed in their defense, and Mackay and Fair be charged in their branch of the case, then they would be in a position to call upon Flood or the estate of O'Brien to contribute, and the same relitigation would result. The truth is, as I view the case, whatever the ruling upon the case might be, the whole of the controversy can not be finally determined without the presence of all the parties to the entire controversy.

As the case appears to me, nothing affecting the question of jurisdiction would result from an argument of the demurrer however it might be determined, and a rehearing for that purpose would be futile. It is therefore denied. If the views expressed are sound, and they seem clearly so to my mind, there is but one course for me to pursue, and that is to remand the cases on both petitions to the state court, and it is so ordered.

IN RE MARTIN C. SCOTT, A BANKRUPT.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

JANUARY 31, 1880.

OBJECTIONS TO DISCHARGE.—Various objections to a discharge considered and overruled.

Before HOFFMAN, D. J.

Daniel T. Sullivan, attorney for bankrupt.

Wright & Hammond, attorneys for opposing creditors.

HOFFMAN, J. The objections relied on at the hearing of this case were:

1. That the bankrupt obtained a considerable sum of money from one of his creditors on the fraudulent pretense that he would give his note therefor, indorsed by one Moss, which indorsement he failed to procure. The proofs fail to support this objection. The bankrupt undoubtedly promised to procure the indorsement referred to; but he made this promise in good faith, and with reasonable ground to believe in his ability to fulfill it. The parties chose to furnish him the money without exacting the fulfillment of the promise. He made no false pretense within the meaning of the criminal law, for he merely undertook to do a certain thing *in futuro*, and so far as appears he would have redeemed his promise had not subsequent events induced the party on whom he relied to change his mind. Moreover, the fact that one or more of his debts has been created by the fraud of the bankrupt is not declared by the act to be a ground for refusing a discharge from his other liabilities. Debts created by fraud are not affected by the discharge; and if the debt in question in this case be of that character, the creditor may sue and recover judgment upon it, notwithstanding the discharge.

2. The second ground of objection is that the bankrupt has concealed a part of his estate or effects. The property alleged to have been concealed was a toll-bridge, which the bankrupt had erected, either upon or leading to his farm,

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and for the use of which by his neighbors he had been accustomed to collect a small toll, under a franchise or license obtained from the state. The concealment contemplated by the statute is evidently a willful and fraudulent concealment of his effects, and not a mere omission to mention them through mistake or accident. If the concealment complained of be of the franchise or license which the bankrupt had obtained from the state, it is sufficient to say, that a franchise to construct a turnpike road and collect tolls thereon, or to run a ferry, and the like, is a personal trust reposed in the grantee, and is not assignable, either at forced sale or by voluntary conveyance, without the consent of the granting party. (*Monroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Id. 286.) And in *The People, ex rel. J. T. Jenkins, v. Duncan et al.*, it was held that such a franchise does not pass by virtue of the assignment to the assignee in bankruptcy. (41 Cal. 507.) There can of course be no fraudulent concealment of property which is not assets of the estate, upon which the creditors can make no claim, and in which the assignee in bankruptcy can acquire no interest. If the concealment complained of be the failure to mention the existence of the structure which he had erected, either wholly or in part upon his land, the answer to the objection is that there seems to be no reason why he should describe that structure, any more than any other fixture or improvement attached to the freehold. His farm is described in his schedules, and that description includes the barns, stables, pig-pens, or bridges upon it, as much as the orchards or vineyards which may have been planted upon it. Certainly there could be no intention, as there could have been no possibility of concealing the existence of a bridge, which, as appears, was absolutely necessary to afford access to the farm, or at least a portion of it.

3. It is further objected that the bankrupt gave "a fraudulent preference" to one Emerson, contrary to the provisions of the act. It appears that after the bankrupt had been attached by some of his creditors, he gave to Emerson a horse, as security for a debt due him on an unsettled account amounting to twenty-five or thirty dollars.

He subsequently, with Emerson's consent, withdrew the horse and substituted for it some dry goods, and material for clothing. The greater part of this, Emerson subsequently returned to the bankrupt, retaining, as he says, about fifteen dollars' worth. All the goods returned to the bankrupt were afterwards used by him for clothing his numerous family.

I am inclined to think that a transaction of this character, so insignificant so far as the amount involved is concerned, hardly constitutes such a fraudulent preference as will deprive him of the benefit of the act. The statute of the state, which is not only very liberal in its provisions, but which is liberally construed by the courts, exempts from forced sale wearing apparel of the debtor, three months' provisions actually provided for individual or family use, etc. The law does not, in terms, require that the wearing apparel shall have been in actual use, or that the materials for it shall have been actually fashioned into garments ready for use.

The testimony does not disclose distinctly of what the dry goods delivered to Emerson consisted. No inventory appears to have been taken. They were hastily packed in a valise and a bag by the bankrupt and his wife. Among the goods some fifty yards of flannels and several dress patterns already cut out, are mentioned. Their total value was probably not more than forty or fifty dollars. The bankrupt was not a trader or shop-keeper; he was a farmer, and the goods had, in all probability, been obtained for family use. To that use they were subsequently applied, with the exception, before stated, of fifteen dollars' worth, retained by Emerson. I am inclined to think that if the bankrupt had been, at the time of the bankruptcy, in possession of these goods, and had omitted to mention them specifically in his schedules, he would not have been liable to the charge of a fraudulent concealment of his assets. If he has chosen to devote materials for clothing to an inconsiderable amount, which he had procured for the use of his wife and children, to secure a creditor for a small debt, the act can hardly be deemed a fraudulent preference

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within the meaning of the twenty-ninth section of the bankruptcy law, even though it should turn out on critical examination that some of the articles were not included in the term wearing apparel, and were thus not within the protection of the exemption law. If they, in fact, were within that protection it is almost needless to observe that no fraud upon his other creditors could have been committed by any disposition he might make of them. They were not part of his assets, and in no way liable for his debts, except so far as he might choose so to apply them.

On the whole, I agree to the conclusion reached by the register, that the creditors have failed to maintain their specifications of objections to the bankrupt's discharge.

IN RE WONG YUNG QUY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

FEBRUARY 5, 1880.

1. **HABEAS CORPUS—JURISDICTION.**—Where an alien prisoner is held in custody in execution of a judgment rendered by a state court convicting him of an offense created by a state statute, alleges in his petition that the statute under which he is convicted was passed in violation of the constitution of the United States, and of the provisions of a treaty of the United States with the nation of which he is subject, the circuit court has jurisdiction on a writ of *habeas corpus* to inquire into the validity of the statute and judgment, and, if found to be in violation of such constitution and treaty, is authorized to discharge the petitioner from such custody.
2. **UNCONSTITUTIONAL STATUTE VOID.**—A statute of a state creating an offense passed in violation of the constitution of the United States, or of a treaty with a foreign nation, is void, and a judgment convicting a party of the offense created by said void statute is also void, and not merely erroneous and voidable.

Before SAWYER, Circuit Judge.

HABEAS CORPUS. The facts appear in the opinion of the court.

George E. Bates, J. M. Rothchild, and M. S. Horan, for the petitioner.

Jo Hamilton, attorney-general, and Crittenden Thornton,
for the respondent.

SAWYER, Circuit Judge. The petitioner, a subject of the empire of China, having been convicted of a misdemeanor committed in removing a dead body of one of his countrymen from the place of interment without a permit, contrary to the provisions of "An act to protect public health from infections caused by exhumation and removal of the remains of deceased persons," passed by the legislature of California, April 1, 1878 (stat. 1877-8, 1050), was sentenced to pay a fine of fifty dollars, and in default of payment to be imprisoned for a period of twenty-five days. Failing to pay the fine, and having been committed to prison, he sued out a writ of *habeas corpus*, and asked to be discharged on the ground that the said act of the legislature of California was passed in violation of the fourteenth amendment of the national constitution, and of the Burlingame treaty; and that it is, therefore, void. Crittenden Thornton, Esq., and the attorney-general of California representing the state, appearing as counsel on the part of the respondent, raise a preliminary objection that the court has no jurisdiction in the case of a party held in custody by virtue of a judgment of a state court, to inquire upon *habeas corpus* into the validity of the judgment under which he is held, where the judgment is regular in form upon its face. It is insisted that the state court had jurisdiction to determine the validity of the statute; and having determined it, the determination is conclusive in all other proceedings, except upon writ of error from a court having appellate jurisdiction to revise the action of the court below. A very able and exhaustive argument has been filed in support of the objection taken to the jurisdiction, the only question as yet submitted for decision.

Section 752 of the R. S. provides that the justices and judges of the United States courts "within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." This section is general and unlim-

ited in its terms. But section 753 limits the cases in which the writ may be issued, and provides, among other cases, that "the writ of *habeas corpus* shall in no case extend to a prisoner in jail unless where he * * * is in custody in violation of the constitution, or of a law or treaty of the United States." Under these provisions it seems clear that the writ may issue and the prisoner be discharged whenever he is "in custody in violation of the constitution or of a law or treaty of the United States." In this case it is claimed that the prisoner is in custody in violation both of the constitution of the United States and of a treaty between the United States and the empire of China; and whether he is in custody in violation of the constitution or treaty is the very question to be investigated. It is claimed, however, that the writ of *habeas corpus* must be confined to cases to which it is appropriate, according to established common law rules relating to the writ, and that it can not be used as a substitute for a writ of error to review a judgment of a state or other court having jurisdiction to inquire into the matter and adjudge the rights of the parties; that in this case the state court, rendering the judgment under which the petitioner is imprisoned, had jurisdiction under the state law to hear and determine the question of the validity of the statute under which the conviction was had, and having determined it, as held by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 202-3, affirmed in subsequent cases, the judgment, in its nature, concludes the subject on which it is rendered and pronounces the law of the case; and when the judgment is of a court of record, whose jurisdiction is final, it is as conclusive on all the world as the judgment of the supreme court of the United States would be; that it puts an end to the inquiry concerning the fact by deciding it; and that, when a judgment is not of a court of final jurisdiction, it can only be reviewed on writ of error by the court having appellate jurisdiction over its judgment.

This position is undoubtedly correct in respect to cases of mere error in the proceedings. But the supreme court, in later cases, has drawn a clear distinction between cases in which the judgment is erroneous, but still valid until re-

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versed, notwithstanding the error, and cases absolutely void, as being entered without authority of law, and erroneous because unauthorized and void. This distinction is established in *Ex parte Lange*, 18 Wall. 175. In that case the statute authorized an alternative punishment for the offense for which conviction was had, of imprisonment for not more than one year, or a fine not exceeding two hundred dollars. The court, inadvertently, adjudged an imprisonment of one year and a fine of two hundred dollars. After paying the fine the prisoner moved for his discharge on the ground that the further imprisonment was unlawful, as being in excess of the power of the court to adjudge. Upon the error being called to its attention, the court, at the same term, vacated the judgment and entered another judgment of imprisonment only. Being imprisoned under the latter judgment he sued out a writ of *habeas corpus*, and was thereupon discharged by the supreme court. Upon the point now under consideration, Mr. Justice Miller, speaking for the court, said: "A judgment may be erroneous and not void, and it may be erroneous because it is void. * * * We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, has fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone." The record "showed the court that its power to punish for that offense was at an end. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist. It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation

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of property, it would, for the same reason, be void." (*Ex parte Lange*, Id. 176.)

On the ground that the judgment was void for want of power, and not merely erroneous, the case was taken out of the rule claimed to be applicable to the present case, and the prisoner discharged. Mr. Justice Clifford delivered an elaborate dissenting opinion, urging the principle and citing the authorities now relied on in this case. Thus the court established a distinction between judgments erroneous and not void, and judgments void as well as erroneous. And this distinction has since been recognized in several instances. Thus in *Ex parte Parks*, 3 Otto, 22, 23, the court says: "From this review of the law it is apparent, therefore, as before suggested, that in a case like the present, where the prisoner is in execution upon a conviction, the writ ought not to be issued, or, if issued, the prisoner should be at once remanded, if the court below had jurisdiction of the offense, and did no act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment. (*Ex parte Kearney*, 7 Wheat. 39; *Ex parte Wells*, 18 How. 307; *Ex parte Lange*, 18 Wall. 163.) But if the court had jurisdiction and power to convict and sentence, the writ can not issue to correct a mere error."

So in *Ex parte Reed*, decided at the present term, the court, speaking through Mr. Justice Swayne, says (100 U. S. 23): "A writ of *habeas corpus* can not be made to perform the functions of a writ of error. To warrant the discharge of the prisoner, the sentence under which he is held must be not merely erroneous and voidable, but absolutely void," thus again recognizing the principle that if the judgment under which the prisoner is held be void as well as erroneous, he may be discharged on the writ of *habeas corpus*, and this involves the jurisdiction to inquire in such proceeding whether the judgment is void, or only erroneous and voidable.

In *Ex parte Bridges*, 2 Woods, 429, Mr. Justice Bradley

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discharged a prisoner who had been convicted in a state court for the crime of perjury arising under a statute of the United States, on the ground that a state court has no jurisdiction of an offense created by an act of congress, and the judgment was, therefore, void. The jurisdictional question on writ of *habeas corpus* was raised, upon which Mr. Justice Bradley observes: "It is contended, however, that where a defendant has been regularly indicted, tried, and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the supreme court of the United States, and that it is too late for a *habeas corpus* to issue from a federal court in such a case. This might be so, if the proceeding in the state court were merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case." (*Ex parte Lange*, 18 Wall. 163.) In speaking of the effect of the present statute quoted at the commencement of this opinion, the learned justice adds: "In view of our late civil strife, and the necessity of protecting those who claim the benefit of the national laws, congress, by the act of February 5, 1867, extended the writ to *all cases* where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States, and made it issuable by the several courts of the United States, and the several justices and judges of said courts within their respective jurisdictions." (14 Stat. 385.)

The present case clearly belongs to the last category. The relator was certainly restrained of his liberty in violation of the law of the United States. * * * The statutes above cited are condensed in section 753 of the R. S. of the United States. They have had the effect greatly to enlarge the jurisdiction by *habeas corpus* in the courts of the United States since the first enactment on the subject in 1789. They have removed all impediment to its use which formerly existed where the prisoner was committed under state authority, provided his imprisonment is contrary to the United States constitution or laws. Mr.

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Justice Bradley participated in the decision in *Ex parte Lange*, cited by him, and in this opinion, and would not be likely to misapprehend the extent to which it was intended to go. If the act of the legislature of California creating, or attempting to create, the offense for which the petitioner was convicted and for which he is held in custody, was passed in violation of any provision of the constitution, or of the provisions of a valid treaty with China, it is void, and does not, and can not, confer upon the state court any authority whatever to adjudge the defendant guilty of the offense charged, or to imprison him therefor. The judgment in that event is void, not merely voidable. The judgment is no more conclusive than that in the case of *Lange*. In that case the court had jurisdiction of the subject-matter and the person. It had authority to determine whether it had exhausted its power or not. But having wrongly determined that its power had not been exhausted, this determination was held not to be conclusive, and the question was re-examined and the prisoner discharged on *habeas corpus*. The case of *Bridges* is similar, and this case is also like those cases in this respect; and like the instances cited in *Lange's case* of a justice of the peace having jurisdiction to fine only, but adjudges that the prisoner be hanged. It is said the judgment is void because the justice has no power to render such a judgment, and the judgment against *Lange* was held to be void, because the power of the court had been exhausted, and there was no law authorizing any further judgment. So, in this case, if the statute under which the prisoner was convicted and held is void, it is no statute. It is no more effective than a piece of blank paper. If no statute, then there is no statute authorizing the conviction, and the court acted without any authority whatever. His judgment is no more effective than it would have been had the statute never been passed, and the conviction been had without any act upon the subject.

If the act in question is void, then there is no law creating the offense for which the prisoner was convicted, and there is nothing over which the court had jurisdiction. It is said, further, that if this act is unconstitutional, the

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restraint of the petitioner's liberty is not "in violation of the constitution," in the sense of the statute, because there is no express inhibition in terms against the passage of such a law. Mr. Justice Bradley did not take this view in *Bridge's case*, for he says: "The present case clearly belongs to the last category. The relator was certainly 'restrained of his liberty in violation of a law of the United States.'" (2 Woods, 432.) Yet there was no more an express prohibition in that case than in this. The state court simply undertook to punish an offense against the United States. There was an offense committed, but it was an offense against another sovereignty. There was no offense of which that court could take cognizance. So in *Lange's case* there was no express prohibition against inflicting both punishments. The provision simply authorized alternative punishments, and the prohibition was not express, but only inferred from a want of a provision expressly authorizing both punishments.

I am satisfied, under these authorities, that this court has jurisdiction upon *habeas corpus* to inquire into the validity of the state statute under which the prisoner was convicted; and if found void, that the judgment as rendered in pursuance of its provisions is also void, and the prisoner entitled to his discharge. The case will, therefore, be retained for the purposes of this inquiry; and the motion to dismiss for want of jurisdiction to examine the case is overruled. Counsel will argue the case upon the merits as to the constitutionality and validity of the act and validity of the judgment.

THE UNITED STATES v. JOHN WILLIAMS.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 15, 1880.

1. **ATTEMPT TO COMMIT MURDER.**—There is no law of the United States for the punishment of the crime of an attempt to commit murder upon land, in places within the exclusive jurisdiction thereof, unless committed by some means other than an assault with a dangerous weapon, as by poison, drowning, or the like.

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2. DANGEROUS WEAPON.—A dangerous weapon is one likely to produce death or great bodily harm; and a loaded pistol is such a weapon within the knowledge of the court.
3. SAME.—When it is practicable for the court to declare a particular weapon a dangerous one or not, it is the duty of the court to do so; but otherwise it is a question of law and fact, to be determined by the jury under the direction of the court.

Before DEADY, District Judge.

Rufus Mallory, for the United States.

William W. Page, for the defendant.

DEADY, J. On January 7, 1879, the grand jury for this district found an indictment against the defendant, containing two counts.

The first one charges him with "an attempt to commit the crime of murder by means not constituting an assault with a dangerous weapon," by willfully and maliciously "shooting one Edward Robert Roy," on October 8, 1879, with a loaded pistol, with intent him to murder, at Sitka, in the territory of Alaska. The second one charges him with an assault upon said Roy, at the time and place aforesaid, with a loaded pistol, with intent him to kill, and alleges that said territory of Alaska was then and there Indian territory. The defendant demurred to the indictment, upon the ground that the facts stated did not constitute a crime.

The court sustained the demurrer to the second count, holding that Alaska was not "the Indian country," within the purview of section 21 of the act of March 27, 1854 (10 Stat. 270; R. S., sec. 2142), defining the crime of an assault by a white person within such country with a deadly weapon, with intent to kill, and citing *U. S. v. Seveloff*, 2 Saw. 311; *U. S. v. Carr*, 3 Id. 302; *Waters v. Campbell*, 4 Id. 121.

The demurrer to the second count was overruled *pro forma*, whereupon the defendant pleaded guilty thereto, and then moved in arrest of judgment for the cause stated in the demurrer.

This count is based upon section 2 of the act of March 3, 1857 (11 Stat. 250; R. S., sec. 5342), which provides, in effect, that every person who, within any place or district of country under the exclusive jurisdiction of the United

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States, or upon the high seas, or other water within the admiralty jurisdiction thereof, and out of the jurisdiction of any particular state, attempts to commit murder "by any means not constituting the offense of assault with a dangerous weapon," shall be punished, etc.

Without doubt, Sitka, in Alaska, is a place under the exclusive jurisdiction of the United States, and not within the jurisdiction of any state. Therefore, it appearing from the indictment that the defendant was first brought within this district for trial, it follows that if the alleged assault is a violation of any law of the United States, the motion must be denied. (R. S., sec. 730; *U. S. v. Carr, supra*, 304.)

The only provision in the statutes of the United States for punishing an attempt to commit murder or manslaughter on land is found in section 5342, *supra*, but for some reason this is confined to cases where the means used do not constitute "the offense of assault with a dangerous weapon."

The punishment of an assault with a dangerous weapon, or with intent to perpetrate a felony, committed on the waters within the jurisdiction of the United States, and out of the jurisdiction of any particular state, was provided for in section 4 of the act of March 3, 1825 (4 Stat. 115; R. S., sec. 5346), but not the attempt to commit murder or manslaughter, unless it was coincident with such assault. But an attempt to commit murder or manslaughter on land, or an assault there, by whatever means committed, was not punishable by any law of the United States until 1857, when, as has been stated, by section 2 of the act of March 3, of that year, it was declared that an attempt to commit murder or manslaughter, whether on land or water, should be punished as therein prescribed; provided, such attempt was not made by means of the assault mentioned in the act of 1825, *supra*, thus limiting the operation of the statute to attempts made by drowning, poisoning, or the like. And probably this was so provided upon the erroneous impression that the act of 1825 was applicable to assaults committed on land as well as water.

But however this may be, as a result of this patch-work legislation, it appears that there is no punishment provided

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for an assault with a dangerous weapon committed within the exclusive jurisdiction of the United States, if committed on land, even if such assault should involve, as it may, and did in this case, an attempt to commit murder.

In the drawing of the indictment, an effort has been made to bring this case within the terms of section 5342, R. S., by an averment therein that the attempt to murder was made "by means not constituting an assault with a dangerous weapon." But this is necessarily avoided, and in effect rendered null by the very statement of the alleged commission of the alleged offense—that the defendant attempted to commit murder by shooting Roy with a loaded pistol.

Whether a particular weapon is a deadly or dangerous one, is generally a question of law. Sometimes, owing to the equivocal character of the instrument—as a belaying-pin—or the manner and circumstances of its use, the question becomes one of law and fact, to be determined by the jury under the direction of the court. But where it is practicable for the court to declare a particular weapon dangerous or not, it is its duty to do so. A dangerous weapon is one likely to produce death or great bodily harm. A loaded pistol is not only a dangerous, but a deadly weapon. The prime purpose of its construction and use is to endanger and destroy life. This is a fact of such general notoriety that the court must take notice of it. (*U. S. v. Small*, 2 Curt. 242; *U. S. v. Wilson*, 1 Bald. 99.) It appears, then, from the indictment, notwithstanding the averment therein to the contrary, that the act alleged to be an attempt to commit murder, was an assault with a dangerous weapon, and therefore not punishable by the statute.

The motion in arrest of judgment must be allowed, and the defendant discharged.

By this ruling the defendant will escape punishment for what appears to have been an atrocious crime, but the court can not inflict punishment where the law does not so provide. It is the duty of the legislature to correct the omission or defect in the law, and it is to be hoped that the result in this case will attract the attention of congress to the matter at an early day.

IN RE PARKER AND MORRIS, IN BANKRUPTCY.

DISTRICT COURT, DISTRICT OF OREGON.

FEBRUARY 19, 1880.

1. **PAYMENT BY NOTE.**—The note of a third person, given and received in payment of the debt of another, is a valid contract, and operates to extinguish and discharge the original debt; and a note given by a partner in payment of a debt of the firm, as to such debt, is the note of a third person.
2. **SAME—BURDEN OF PROOF.**—To constitute an absolute payment of a pre-existing debt by a promissory note, there must be an agreement to receive it as such, and the burden of proof is upon the party alleging the fact.
3. **PREFERENCE.**—The creditor of an insolvent firm, with knowledge of such insolvency, procured P., a member of the firm, to make his promissory note, secured by a mortgage upon his individual property, in payment of the firm debt: *Held*, 1. That such payment was an unlawful preference over the other creditors of the firm, and therefore invalid; 2. That the mortgage was an unlawful preference over the creditors of P., and also the creditors of the firm, and therefore invalid; 3. That the creditor could only prove his debt against the estate of the firm, and then only for a moiety thereof.
4. **FRAUD BY A CREDITOR.**—The actual fraud on the part of a creditor receiving a preference contrary to section 39 of the bankrupt act, as amended by section 12 of the act of June 22, 1874 (18 Stat. 180), which will prevent him from proving his debt for more than a moiety thereof, is something more than the passive receipt of payment from an insolvent debtor, with reason to believe him insolvent, but the creditor must be an actor in the fraud—must do something to induce or coerce his debtor to make him a payment under circumstances constituting it an unlawful preference.

Before DEADY, District Judge.

ROBERT A. IRVINE proved a debt upon a promissory note of two thousand five hundred and forty-four dollars and sixty-two cents against the individual estate of Allen Parker, a member of the bankrupt firm of Parker & Morris. The assignee objected to the proof, that the claimant, at the time of taking the note from Parker, received a preference, contrary to the provisions of the bankrupt act. The claimant answered, denying the allegation, and averring that he had surrendered the security, and proved his debt as an unsecured one.

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Henry Ach, for the assignee.

William Strong, for the defendant.

DEADY, J. From the evidence taken before the register it appears that Allen and John Parker and A. B. Morris, in the early part of 1877, and some years prior thereto, were partners, engaged in the warehouse business and dealing in wheat at Albany. Irvine stored wheat with them until the amount reached about eight thousand bushels, which the firm purchased in December, 1876, or January, 1877, at one dollar a bushel "on short time."

The firm and the individual members thereof were then insolvent, and had been so for some time.

In the latter part of February, John Parker and Morris transferred the business and warehouse to Allen, he to pay the debts of the firm as far and as fast as the assets would allow. About February 20, 1877, Irvine was informed of the transfer to Allen Parker, and assented to it, prior to which time he had been paid the sum due him by the firm, less two thousand four hundred and eighty-six dollars and sixty cents.

On March 26, 1877, Irvine, being aware of the insolvency of the firm and that of the members thereof, demanded of Parker payment of the balance due him or security therefor, stating "*that the company was not able to pay its debts,*" but that if Parker would give him his note secured by a mortgage upon his farm he would wait a year for the money. Parker being unable to pay the debt, gave Irvine his note for the same, payable in one year thereafter, with interest at one per centum per month secured by a mortgage upon his farm of two hundred and forty-seven acres in Linn county, and certain lots in the town of Albany, valued in the inventory in the aggregate at seven thousand five hundred dollars.

After this, in the latter part of May, an attempt to compromise with the creditors of the firm having failed, Morris proposed to put the firm into bankruptcy, and Irvine endeavored to dissuade him from so doing until the limitation upon the inquiry as to the validity of his mortgage, four

months from the date thereof, had expired, but Morris refused, saying that all the creditors must share alike, and filed his petition upon June 5, following, upon which the firm and the individuals thereof were duly adjudged bankrupts.

Upon the hearing before the register, the matter was certified here for decision.

Upon the argument the point was made, that the note of Parker being given in payment of the firm debt, a debt for which he was already liable, is invalid for want of consideration.

The authorities are not uniform upon this question, but the weight of them, as well as reason and considerations of convenience and utility, favor the rule that the note of a third person given and received in payment of the debt of another is a valid contract, and operates to extinguish or discharge the original debt; and that a note given by a partner for a debt of the firm is, as to such debt, the note of a third person.

In *Sheehy v. Mandeville*, 6 Cranch, 264, Chief Justice Marshall said: "This principle appears to be well settled. The note of one of the parties, or of a third person, may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case, for a man may, if such be his will, discharge his debtor without any consideration. But, if it did apply, there may be inducements to take a note from one partner liquidating and evidencing a claim on a firm which might be a sufficient consideration for discharging the firm. (See also, upon this point, *In re Ouimette*, 1 Saw. 53: *Cumber v. Wayne*, and notes thereof, in 1 Smith's L. Cas. 453.)

But to constitute an absolute payment of a pre-existing debt by a promissory note there must be an agreement to receive it as such, and the burden of proof is upon the party alleging this fact.

In *Harris v. Lindsay*, 4 Wash. C. C. 273, Mr. Justice Washington held that when there was an agreement between partners that one of them should retain the partnership effects and pay the debts, "no indulgence granted by a

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creditor to the paying partner, which falls short of an agreement, express or implied, to take him as the debtor, and to discharge the other partner," can have the effect to discharge the retiring partner.

The note being valid as the note of a third person received in payment of the debt of the firm, what effect has the bankrupt act upon the transaction? The giving of the note merely, while it increased the liabilities of Allen Parker, and by so much diminished his ability to pay his individual creditors in full, did not, it seems to me, constitute a preference, as against such creditors.

The mere creation or acknowledgment of a debt does not create a preference. A debt contracted by an insolvent person is entitled to payment out of his estate, the same as if he was solvent. Nothing less than payment or a pledge to secure payment amounts to a preference. By means of the note Parker became indebted to Irvine, but the latter was not thereby preferred over the other individual creditors of the former. Such creditors have a right to question the validity of this debt because its allowance diminishes the fund to which they have a right to look for the satisfaction of their claims. But the note being valid—given upon a sufficient consideration—the claim as an unsecured one is good as against the individual creditors of Parker.

But is it so as against the creditors of the firm? The bankrupt act (sec. 36; sec. 5121 R. S.) provides that the joint estate of a partnership shall be first applied to the payment of the creditors of the partnership and the separate estate of each partner to the payment of his separate creditors, and if there is any balance of either of said estates after satisfying the claims of the creditors first entitled to be paid thereout, it shall be added to the other estate for the benefit of the creditors thereof.

Under this rule, if Parker's separate estate was more than sufficient to pay his individual creditors, excluding this claim of Irvine's, the balance would be added to the joint estate for the benefit of the joint creditors. But if this debt is allowed against the separate estate of Parker it must be paid in full before any portion of such estate can be

applied upon the debts of the firm. For illustration: Suppose that the separate estate is just sufficient to pay the individual debts of Parker, including the claim of Irvine, and that the joint estate is only sufficient to pay the firm creditors twenty-five cents on the dollar—Irvine, by taking the note of Parker in payment of his claim upon the firm has obtained a material preference over the other creditors of the firm, whose claims are quite as meritorious as his. By this means, if allowed, he secures the payment of his claim in full out of the surplus of the separate estate which rightfully belongs to the creditors of the joint estate.

But, in fact, the difference between the value of the joint and separate estates, compared with the debts proved against them, is greater than supposed.

The estates have all been reduced to cash, and neither of the partners, except Allen Parker, appears to have had any separate estate. According to a report of the register, made on the fourteenth instant, the debts proved against the joint estate amount to eighteen thousand four hundred and nineteen dollars and twenty-six cents, and against the separate estate of Parker, including Irvine's claim, seven thousand five hundred and eighty-three dollars and twenty-five cents; and the assets of the joint estate are eight hundred and forty-nine dollars and nineteen cents, and of the separate estate five thousand nine hundred and forty-nine dollars and sixty-five cents. Upon this basis the register estimates the dividends payable to the creditors from the joint estate at four per cent., and the separate estate at seventy-five per cent.

But if the sum of three thousand four hundred and twenty dollars, the proceeds of the sale of the warehouse, which is claimed to be partnership property, is transferred from the separate to the joint estate, the former will then pay a dividend of thirty per cent., and the latter one of twenty-two per cent.; but even upon this basis, with the Irvine claim proved against the joint estate, it will only pay nineteen per cent., while the separate one will pay forty-five per cent.

Tested by the bankrupt act, the spirit and purpose of which is to prevent one creditor of an insolvent getting the

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advantage of another, this is clearly an unjust transaction, and although no case has been found exactly in point, I am satisfied that it constitutes an unlawful preference, and is therefore invalid.

But it is claimed, on behalf of Irvine, that there was an absolute agreement to take Parker for the debt, and discharge the firm at the time the property and business was turned over to Parker, and that the note subsequently given by him to Irvine was merely given in satisfaction of the obligation thus incurred by Parker to Irvine; and that at the date of this agreement Irvine had no reason to believe the firm was insolvent. For the sake of the argument it may be admitted that Irvine had no knowledge of the insolvency at this time. But the evidence does not satisfy my mind that there ever was any absolute agreement on the part of Parker to pay this debt until he gave his note for the same. Prior to that time there was doubtless an understanding that Parker was to pay the claim, but it was as well understood and expected, that he was to make such payment as and for the firm and from its assets only.

And this is evident from what Irvine said to Parker, as an excuse for demanding payment of his claim, either in money or the individual note and mortgage of the latter, "that the company was not able to pay its debts." If, as is claimed, Irvine already had Parker's individual obligation to pay the debt, why give as a reason for exacting the note and mortgage of Parker, that the company was not able to pay its debts? Because, up to that time he had looked to the firm as his debtor, and expected Parker to pay him as the agent of the firm, and out of its assets, and not otherwise.

This proof of debt, as against the separate estate of Parker, must be rejected, and the creditor allowed to prove his original claim against the joint estate, as though this note had not been given, unless he has forfeited his right to prove for more than a moiety thereof by reason of taking this preference.

Section 39 of the bankrupt act, as amended by section 12 of the act of June 22, 1874 (18 Stat. 180), provides that a person receiving a payment or conveyance from an insolvent

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contrary thereto, shall be liable for the same to the assignee; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy.

The fraud here intended means something more, I suppose, than the passive receipt of payment from an insolvent debtor, with reason to believe him insolvent.

In my judgment, a creditor is not guilty of "actual fraud," within the meaning of this section, unless he does something to induce or coerce his insolvent debtor to make him a payment under circumstances constituting it an unlawful preference.

A creditor who obtains payment by this means, with reasonable cause to believe his debtor insolvent, is guilty of actual fraud, and can only prove for a moiety of his debt.

Irvine's case falls clearly within this category. Virtually, he constrained Parker to give him his individual note in payment of a firm debt, and for the reason given by himself at the time—that the firm was insolvent, unable to pay its debts.

Viewed in this light, the transaction constituted an unlawful preference and a fraud upon the act, which Irvine, with full knowledge of the facts, actively participated in.

But, even assuming that the note of March 26 was given, not in payment of the firm debt, but in satisfaction of a prior absolute agreement by Parker to pay such debt, yet the taking of the mortgage to secure it was an unlawful preference and a fraud upon the act as against the individual creditors of Parker, and, therefore, if this claim were otherwise, a valid one against his separate estate, it could only be proved for a moiety thereof. The demanding and taking the mortgage, under the circumstances, constituted the "actual fraud" on the creditor's part, and the subsequent waiver of the security, by proving the debt as an unsecured one when it was manifest that the mortgage could not be enforced, does not condone or excuse it.

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The statute is peremptory, and declares that such a creditor “shall not be allowed to prove for more than a moiety of his debt.”

The taking of such security was also an unlawful preference as against the creditors of the firm, because, in effect, it was an appropriation of so much of the separate estate of Parker to the payment of Irvine’s debt, to the prejudice and wrong of the other creditors of the firm, to whom any surplus of such estate, after payment of his individual debts, justly belonged.

THE UNITED STATES v. WILLIAM C. GRISWOLD.

DISTRICT COURT, DISTRICT OF OREGON.

FEBRUARY 24, 1880.

1. **ARREST IN CIVIL ACTION—DISCHARGE FROM.**—The arrest before judgment in civil actions being allowed to the end that the plaintiff may take the body of defendant in execution in case the judgment is not satisfied; and the statute of Oregon having prescribed that a judgment debtor confined upon execution may be finally discharged from imprisonment upon the surrender of his property: *Seemle*, that the defendant is entitled to be discharged from arrest unless the plaintiff charges him in execution within what may be considered a reasonable time after judgment; and this although there is no statute which in terms or effect directs or provides for such discharge.
2. **SAME—RULE AT COMMON LAW.**—Prior to the revolution, in the court of king’s bench, the rule was that a “defendant prisoner” against whom a judgment was given, and who was not charged in execution thereof within two terms thereafter, might be discharged from custody; and the statute of Oregon being silent on the subject, the court assumes that such rule is applicable to the case as a part of the common law in force in this state, and will grant or refuse an application for a supersedeas and discharge by a judgment debtor accordingly.

Before DEADY, District Judge.

Addison C. Gibbs, for the plaintiff.

William W. Page and George H. Durham, for the defendant.

DEADY, J. On May 27, 1877, the United States, by B. F. Dowell, commenced an action against the defendant, under

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States, or upon the high seas, or other water within the admiralty jurisdiction thereof, and out of the jurisdiction of any particular state, attempts to commit murder "by any means not constituting the offense of assault with a dangerous weapon," shall be punished, etc.

Without doubt, Sitka, in Alaska, is a place under the exclusive jurisdiction of the United States, and not within the jurisdiction of any state. Therefore, it appearing from the indictment that the defendant was first brought within this district for trial, it follows that if the alleged assault is a violation of any law of the United States, the motion must be denied. (R. S., sec. 730; *U. S. v. Carr, supra*, 304.)

The only provision in the statutes of the United States for punishing an attempt to commit murder or manslaughter on land is found in section 5342, *supra*, but for some reason this is confined to cases where the means used do not constitute "the offense of assault with a dangerous weapon."

The punishment of an assault with a dangerous weapon, or with intent to perpetrate a felony, committed on the waters within the jurisdiction of the United States, and out of the jurisdiction of any particular state, was provided for in section 4 of the act of March 3, 1825 (4 Stat. 115; R. S., sec. 5346), but not the attempt to commit murder or manslaughter, unless it was coincident with such assault. But an attempt to commit murder or manslaughter on land, or an assault there, by whatever means committed, was not punishable by any law of the United States until 1857, when, as has been stated, by section 2 of the act of March 3, of that year, it was declared that an attempt to commit murder or manslaughter, whether on land or water, should be punished as therein prescribed; provided, such attempt was not made by means of the assault mentioned in the act of 1825, *supra*, thus limiting the operation of the statute to attempts made by drowning, poisoning, or the like. And probably this was so provided upon the erroneous impression that the act of 1825 was applicable to assaults committed on land as well as water.

But however this may be, as a result of this patch-work legislation, it appears that there is no punishment provided

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for an assault with a dangerous weapon committed within the exclusive jurisdiction of the United States, if committed on land, even if such assault should involve, as it may, and did in this case, an attempt to commit murder.

In the drawing of the indictment, an effort has been made to bring this case within the terms of section 5342, R. S., by an averment therein that the attempt to murder was made "by means not constituting an assault with a dangerous weapon." But this is necessarily avoided, and in effect rendered null by the very statement of the alleged commission of the alleged offense—that the defendant attempted to commit murder by shooting Roy with a loaded pistol.

Whether a particular weapon is a deadly or dangerous one, is generally a question of law. Sometimes, owing to the equivocal character of the instrument—as a belaying-pin—or the manner and circumstances of its use, the question becomes one of law and fact, to be determined by the jury under the direction of the court. But where it is practicable for the court to declare a particular weapon dangerous or not, it is its duty to do so. A dangerous weapon is one likely to produce death or great bodily harm. A loaded pistol is not only a dangerous, but a deadly weapon. The prime purpose of its construction and use is to endanger and destroy life. This is a fact of such general notoriety that the court must take notice of it. (*U. S. v. Small*, 2 Curt. 242; *U. S. v. Wilson*, 1 Bald. 99.) It appears, then, from the indictment, notwithstanding the averment therein to the contrary, that the act alleged to be an attempt to commit murder, was an assault with a dangerous weapon, and therefore not punishable by the statute.

The motion in arrest of judgment must be allowed, and the defendant discharged.

By this ruling the defendant will escape punishment for what appears to have been an atrocious crime, but the court can not inflict punishment where the law does not so provide. It is the duty of the legislature to correct the omission or defect in the law, and it is to be hoped that the result in this case will attract the attention of congress to the matter at an early day.

The only question arising upon this motion is, where the defendant in a civil action is arrested before judgment, and remains in arrest until judgment is given therein, or is thereupon surrendered by his bail, when may he have a supersedeas and discharge from such arrest unless he is charged in execution thereon?

At common law the preliminary arrest in civil actions was made upon a *capias ad respondendum*, the purpose of which, as its name implies, was only to secure the appearance of the defendant in court to answer the plaintiff on the return day of the writ, and the party either remained in the custody of the sheriff until that time, or gave him special bail for his appearance.

Upon the return day, the defendant appeared by putting in bail, as it was called, to the action, failing which the bail for his appearance was forfeited. The bail to the action was an undertaking that the defendant would satisfy any judgment obtained against him or render himself a prisoner upon the execution thereon. (3 Bl. 290, 291.)

A judgment at common law for the payment of money might be enforced by an execution against the body, called a *capias ad satisfaciendum*, in all cases in which the defendant might have been arrested in the first instance upon a *capias ad respondendum*, and the purpose and effect of it was to keep the body of the debtor in close custody until the judgment was satisfied. (3 Bl. 414, 415.)

The arrest in this case, as has been stated, was made under an act of congress, but under section 914 of the R. S., the subsequent proceedings thereon are governed by the law of the state. Indeed, the arrest itself might have been made under section 106 of the Or. Civ. Code, which authorizes an arrest in civil actions for a penalty or a fraud. Sections 108 and 109 of such code provide that the defendant shall be discharged from the arrest in a civil action "at any time before execution," either upon giving bail or making a deposit in lieu thereof; and that the undertaking of the bail must be "to the effect that the defendant shall at all times render himself amenable to the process of the

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court during the pendency of the action, and to such as may be issued to enforce the judgment therein."

From this it appears that the bail given upon the provisional arrest under the code is not merely the special bail of the common law, given to the sheriff for the appearance of the defendant in the action, but it is also the equivalent in operation and effect of the common law bail to the action, by which the sureties therein undertook that the defendant would satisfy any judgment that might be given against him, or render himself in execution thereof upon process against his body to enforce the same, whenever lawfully required.

At common law the plaintiff might have an execution against the body in the first instance, but could not thereafter have one against the defendant's property, except in special cases, as where the defendant escaped, died, or was discharged under the insolvent act without satisfying the judgment. Ordinarily, the taking of the body in execution was considered a discharge of the judgment, and a satisfaction of the debt. (3 Bl. 415; *Jackson v. Benedict*, 13 Johns. 535; *Sunderland v. Loder*, 5 Wend. 59; *Wakeman v. Lyon*, 9 Id. 242; *Chapman v. Hatt*, 11 Id. 423; *Poucher v. Holly*, Id. 185; *Beaty v. Beaty*, 2 Johns. Ch. 431)

The Or. Civ. Code, sections 272, 276, gives the plaintiff an execution against the body in all cases where the defendant might have been arrested before judgment, but only "after the return of the execution against property unsatisfied in whole or in part," and by section 277 it is provided, that a person arrested on execution shall be imprisoned until it is satisfied, or he is legally discharged. By title 2 of chapter 28 of Mis. Laws, provision is made for the discharge of persons confined upon execution, upon the surrender of their property; but it is also therein provided (Or. Laws, sec. 21, p. 628), that the judgment, notwithstanding such imprisonment and discharge, may be thereafter enforced against the property of the defendant.

At common law, an execution, either against the body or the property, might issue, of course, within a year and a day from the entry of the judgment. (3 Bl. 421; 1 Arch. Pr.

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281; Atty. Pr. K. B. 278; 401; Stat. Westminster, 2; 13 Ed. I., c. 45; 3 Bac. Abr. 407.)

By the law of this state (Or. Civ. Code, secs. 271, 292), an execution may issue, of course, at any time within five years after the entry of judgment; but, as has been stated, the execution against the body can not issue until one against the property has been returned unsatisfied. (*Id.*, sec. 276.) From this, it appears that at common law the plaintiff might take the body of the defendant on execution, of course, within a year and a day from the entry of judgment, and may do so under the law of this state within five years from such entry.

But there is no statute of this state which prescribes, directly or in effect, within what time, after judgment, a defendant in arrest is entitled to be discharged, unless taken upon execution issued thereon. By the New York code (sec. 288), it is provided, that where the defendant is "in actual custody under an order of arrest," and the plaintiff neglects to issue execution against the person of the defendant for three months after the entry of judgment, the defendant may be discharged from custody, unless good cause to the contrary be shown. As to what was the practice at common law upon this point, counsel has not cited any authority; and I have been inclined to the opinion that, in the absence of any positive rule or practice to the contrary, the defendant is not entitled to be discharged so long as the plaintiff is entitled to charge him in execution, which is five years from the entry of the judgment, according to the statute of this state, and according to the common law a year and a day. Upon this theory of the law, counsel for the plaintiff contend that the defendant can not be discharged from this arrest for five years from the judgment, and upon the view most favorable to the defendant, he would not be entitled to such discharge until the expiration of a year from that date.

But the law of this state having provided that a judgment debtor in custody upon an execution may be finally discharged from imprisonment upon a surrender of his property

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subject to execution, and as such discharge can not take place while the defendant is in custody upon the arrest before judgment, it may be said that the purpose and the operation of the law providing for the discharge of a judgment debtor upon the surrender of his property would be hindered and denied if the plaintiff could compel such debtor to remain in custody upon the arrest before judgment until he saw proper to take him upon execution.

Further, the object of the arrest before judgment being merely to hold the person of the defendant so that if he does not satisfy any judgment which may be obtained against him, his body may be taken upon an execution to enforce the same, it may be said, that if the plaintiff does not exercise the right to take the body of the defendant in execution within a reasonable time, the defendant ought to have a remedy by a supersedeas and discharge. And upon further reflection, these considerations have the effect to incline my mind to the conclusion, that in the absence of any statute directly authorizing the discharge of a defendant in arrest who is not charged in execution within a certain time after judgment, the court might say that his discharge was contemplated by the law, and should be granted unless the plaintiff, within what might be considered a reasonable time, under the circumstances, should charge him in execution.

But upon further examination of the matter I find, that according to the first volume of *The Attorney's Practice in the Court of King's Bench*, 366, a work published in 1759, the rule in that court was that if the plaintiff obtained judgment against "a defendant prisoner" and did "not charge such defendant so remaining in prison, in execution of the judgment within two terms next after obtaining such judgment," reckoning the term wherein the judgment was obtained as one, the defendant may obtain his discharge, citing in the margin as authorities, *Carth.* 469; 2 *Str.* 943, 1153, 1215.

Assuming, as I do, that this is the rule of the common law, it applies to the case and supplies the omission in the statute of the state. It authorizes the defendant's discharge

in case the plaintiff neglects to charge him in execution, and prescribes the time beyond which he is entitled to it.

The judgment in this case was given at the July term, 1879, and this is the November term of the same year, and the second term thereafter within the rule. This term expires on the day before the first Monday in March next, when another term begins. If the plaintiff does not charge the defendant in execution before that time he may then apply for his discharge, and it will be granted him, of course. The present motion, however, being premature, is denied.

LEANDER HOLMES v. THE OR. & CAL. RAILWAY CO.

DISTRICT COURT, DISTRICT OF OREGON.

FEBRUARY 28, 1880.

1. DEATH, ACTION FOR.—Although an action may not lie at common law to recover damages for the death of a person, it will at the civil law, and therefore *semble* that it will in admiralty.
2. MARINE TORT.—A marine tort is one that occurs on any public navigable water of the United States, whether caused by a wrongful act or omission, and the proper district court, as a court of admiralty, has jurisdiction of a suit to recover damages therefor.
3. RIGHT GIVEN BY STATE STATUTE.—The jurisdiction of the national courts does not depend upon the origin of the rights of the parties; and where a state statute gives a right, the same may be asserted or enforced in such courts whenever the citizenship of the parties or the nature of the subject will permit.
4. SAME.—The right given by section 367 of the Or. Civ. Code, to an administrator to recover damages on account of the death of his intestate from the party by whose act or omission such death was caused, may be enforced in the national courts.
5. SAME—SUIT IN ADMIRALTY.—When a passenger on the railway ferryboat plying across the Wallamet river between East Portland and Portland was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the district court by the administrator of the deceased, to recover the damages given therefor by section 367, *supra*.
6. ADMINISTRATION—JURISDICTION TO GRANT.—By the constitution of this state, the county court is a court of record with general jurisdiction of probate matters, to be regulated by law (art. 7, secs. 1 and 12); and by statute (Civ. Code, sec. 869) it has the exclusive power to grant let-

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Points decided.

ters of administration upon the estate of a person who at or immediately before his death was an inhabitant of the county: *Held*, 1. That a decree of the county court of Multnomah county, granting letters to D. upon the estate of P., by which it appears to have been adjudged by said court upon a proper petition, that P. was an inhabitant of the county at or immediately before his death, can not be questioned collaterally on the ground that P. was not in fact such inhabitant; 2. That said court having general jurisdiction of the subject-matter—the granting of administration upon the vacant estate of a deceased person—it had the authority to inquire and determine whether, in that particular case, the deceased was an inhabitant of the county or not, and that its decision upon the question is conclusive, except upon appeal; and, 3. That a subsequent decree by the county court of another county granting letters of administration upon the same estate to H., while the first was in full force and effect, is null and void.*

7. INHABITANT.—The word “inhabitant,” as used in the section 1053 aforesaid, has a narrower and more limited signification than domicile, and implies a personal presence in the county as a dweller therein.
8. NEGLIGENCE.—The defendant's steam ferry crossed the Willamette river to Portland on a dark night with passengers from its railway, and P., in stepping from the boat to the pontoon at the landing, stumbled and fell into the river, and was drowned: *Held*, that the want of a guard to prevent the passengers from attempting to go ashore before the landing was safely made, and some sufficient signal to warn passengers when it was proper to go ashore, and particularly the want of sufficient light upon the boat and pontoon to enable passengers to readily observe the same and their relative situation, was negligence, and caused the death of P.
9. CONTRIBUTORY NEGLIGENCE.—This matter is a defense, and the burden of proof is upon the defendant to establish it; and drunkenness is not *per se* such negligence, but only more or less evidence of it according to the circumstances.
10. COMMON CARRIER.—A common carrier of passengers for hire is bound to provide for their safety so far as is practicable by the exercise of human care and foresight, and where one is drowned under the circumstances aforesaid, drunkenness, if it existed, was not contributory negligence.
11. DAMAGES.—The damages recoverable under section 367 of the Or. Civ. Code, by an administrator for the death of his intestate, are general assets of the estate, and are given merely as a pecuniary compensation for the death, and not as a *solutum*; nor are they to be exemplary or vindictive; but according to the value of the life, having due regard to the capacity and disposition of the deceased to be useful—to labor and to save.

Before DEADY, District Judge.

Sidney Dell, for the libellant.

Cyrus A. and Joseph N. Dolph, for the defendant.

*The points stated in the sixth head-note were affirmed by the circuit court on appeal in an elaborate opinion rendered by the circuit judge at the April term, 1881.

DEADY, J. This suit is brought to recover the sum of four thousand nine hundred dollars, on account of the death of William A. Perkins, the libelant's intestate, alleged to have been caused by the negligence of the defendant, on November 16, 1868, while transporting said Perkins across the Wallamet river, at Portland, on the defendant's duly enrolled steam ferryboat No. 1.

Substantially, the libel alleges that on September 17, 1879, by the order of the county court of Jackson county, Oregon, the libelant was duly appointed administrator of the estate of said Perkins, and that pursuant thereto he duly qualified as such administrator and received letters of administration upon said estate, duly issued by the clerk of said court; that on said November 16, the defendant, as owner of said ferryboat, was engaged in carrying passengers, for hire, across said Wallamet river, between East Portland and the foot of F street, in Portland, the same at said point being a public navigable river of the United States, and within the ebb and flow of the tide; that at seven p. m. of said day said Perkins took passage on said boat at East Portland, and by reason of the defective condition thereof and the negligent and unskillful manner in which the west landing was made, the darkness of the night, the want of lights and guards, said Perkins was there "precipitated" into the river and drowned.

The defendant has taken sixty-two exceptions to the libel for "surplusage, irrelevance and impertinence," which appear to include the whole of it, and also an exception for the same causes and for repetitions therein, to the libel as a whole. According to rule 36 of the admiralty rules, "exceptions may be taken to any libel, allegation or answer for surplusage, irrelevance, impertinence, or scandal; and if upon reference to a master, the exception shall be reported to be so objectionable and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found."

On the argument no specific portion of the libel was pointed out as impertinent, except a brief allegation concerning the danger incurred by other passengers on the

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same occasion, but it was insisted generally that the case of the libelant was stated with unnecessary particularity and repetition.

In admiralty, particularity in pleading is not generally considered a fault, but the reverse. The rule is, that the pleader must state all the essential particulars of the alleged tort or misconduct, with the circumstances of time and place. (Ben. Ad. 486, 487; 2 Pars. on Ship. and Ad. 381; Ad. rule 23; *The Clement*, 2 Curt. 366; *Mucomber v. Thompson*, 1 Sum. 385; *The Quickstep*, 9 Wall. 670; *The Syracuse*, 12 Id. 173.) I do not think this libel is objectionable for impertinence, and therefore disallow these exceptions at the cost of the defendant.

Exceptions are also taken to the libel, that it is informal and insufficient, because it does not appear: 1. That the libelant has capacity to institute or prosecute this case; 2. That he is the duly qualified administrator of said Perkins; 3. That he has sustained any damage or that the defendant is indebted to him; and, 4. That the subject-matter of the suit is not within the jurisdiction of the court.

These exceptions in admiralty are in the nature of special demurrers at common law.

The first and second exceptions are substantially the same, and only make the objection that, upon the face of the libel, the libelant is not the qualified administrator of the deceased, and, therefore, not entitled, as such, to maintain this suit.

Now, the libel not only states expressly that the libelant is the duly qualified administrator of the deceased, but sets forth every particular fact necessary to make him so. These exceptions are disallowed also.

In support of the third exception it is contended that the death was not caused by a marine tort, because it took place in the course of the performance of a contract mainly to be performed on land. This argument assumes what does not appear upon the face of the libel, but it is well understood, that Perkins was not only a passenger on the defendant's boat on the trip across the Wallamet river when the death occurred, but also on its railway from some

point north of Roseburg, and that the transportation across the river was merely incidental to, or an insignificant part of the contract to convey the deceased to Portland. Admitting, however, that such was the fact, it does not affect the result.

The jurisdiction of courts of admiralty in cases of torts depends wholly upon locality. Where a tort is committed upon a public navigable water of the United States, it is a marine tort within the jurisdiction of the proper admiralty court. The term "torts" includes wrongs suffered in consequence of the negligence or malfeasance of others, when the remedy at common law was by an action on the case. (*Waring v. Clarke*, 5 How. 451; *The Genesee Chief*, 12 Id. 450; *The Philadelphia etc. Railway Co. v. The Philadelphia etc. Towboat Co.*, 23 Id. 214; *The Commerce*, 1 Blatchf. 575; *The Belfast*, 7 Wall. 637; *Insurance Co. v. Dunham*, 11 Id. 25.)

This voyage upon which this death occurred being made upon a public, navigable water of the United States, it matters not whether the boat was running in connection with a railway or otherwise, or whether it was plying up or down the stream, or across it. The length or direction of the voyage or its relation to other means or modes of transportation in no way affect the fact stated in the libel, and upon which the jurisdiction of the court of admiralty alone depends, that the tort was committed upon a public navigable water of the United States.

Upon this and the remaining exception two other points are made by counsel for the defendant, namely: 1. That in admiralty, as at common law, no action is maintainable for the wrongful death of another; and, 2. That the damages given by section 367 of the Or. Civ. Code, for the death of a person "caused by the wrongful act or omission of another," can not be recovered by a suit in admiralty or otherwise than by an action at law in the state court; and upon these the contention mainly turns.

It is admitted that it came to be the rule at common law that an action will not lie to recover damages for the death of a human being. The maxim, "*actio personalis moritur*

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cum persona," was held to apply. It is also admitted that the weight of authority in this country is with the English rule.

But it is not admitted that the rule is founded in reason or is consonant with justice.

The earliest English case is *Higgins v. Butcher*, Yelv. 89, in which it was held that a master could not maintain an action for the death of his servant, feloniously caused, for the reason that the private injury was merged in the felony. But this would not apply to a case where the death was caused by negligence, not criminal, and at this day would not be held sufficient to defeat the private remedy when it otherwise existed.

Afterward (1808), Lord Ellenborough, in *Baker v. Bolton*, 1 Camp. 493, said, at *nisi prius*, in a case by a husband for the death of his wife, caused by injuries received in the upsetting of the defendant's coach, that "in a civil court, the death of a human being can not be complained of as an injury."

The subsequent cases, both English and American, appear to rest upon the authority of *Baker v. Bolton*, and the absence of any precedent or *dictum* to the contrary.

The right to maintain the action has been denied in several of the state courts, among others, in Massachusetts, in *Carey v. Berkshire Railway Co.*, 1 Cush. 477, and in New York, in *Green v. Hudson Railway Co.*, 2 Keyes, 294; but it has been maintained in the latter state, in *Ford v. Monroe*, 20 Wend. 210, and in Nebraska, in *Sullivan v. Union Pacific Railway Co.*, 3 Dill. 341. It has also been denied in *Insurance Co. v. Brame*, 5 Otto, 756.

In *Sullivan v. Union Pacific Railway Co.*, Mr. Justice Dillon disapproves of the common law rule, and, speaking of the decision in *Baker v. Bolton*, says: "Considering that it is not reasoned and cites no authorities, and the time when it was made, and that the rule it declares is without any reason to support it, my opinion is, that it ought not to be followed in a state where the subject is entirely open for settlement."

But in 1846 parliament interfered, and by the act of 9

and 10 Vict., c. 93, commonly called Lord Campbell's act, gave an action to the administrator for the benefit of the family, on account of the death of a person, caused by the "wrongful act, neglect, or default" of another; and most of the states of the union, including Oregon, have since followed this illustrious example.

But the civil law permitted the action, and it is not admitted that in a court of admiralty, which is not governed by the rules of the common law, a suit for damages on account of the death of a person may not be maintained. In *The Charles Morgan*, 4 P. C. Law Jour. 151, the district court for the southern district of Ohio, in a suit in admiralty brought by the widow to recover damages for the death of her husband, sustained the jurisdiction upon the ground that a majority of the decisions in the federal courts favored it, and that it was expedient that the case should be tried on its merits before it was taken up on appeal.

In *The Steamboat Co. v. Chase*, 16 Wall. 532, Mr. Justice Clifford incidentally considers the question, and says: "Difficulties, it must be conceded, will attend the solution of the question, but it is not necessary to decide it in this case."

In *The Sea Gull* (Chase's Dec. 146), Chief Justice Chase sustained a libel by a husband for damages for the death of his wife, caused by a collision between the *Sea Gull* and the *Leary* on the Chesapeake. In the course of his opinion he cites, with approval, the observation of Mr. Justice Sprague in *Cutting v. Seabury*, 1 Sprague, 522, that "the weight of authority in common law courts seems to be against the action," for damages on account of the death of a person, but natural equity and the general principles of law are in favor of it;" and adds: "certainly, it better becomes the humane and liberal proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." And in *The Highland Light*, Chase's Dec. 151, which was a libel *in rem* by the widow and son of an employee on the vessel who lost his life by the collapse of a steam chimney, the chief justice affirmed his ruling in *The Sea Gull*, and said: "The jurisdiction for

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marine torts in admiralty may be said to be co-extensive with the subject. It depends on the locality of the wrong, not upon its extent, character, or the relations of the person injured."

But it is unnecessary to consider this point further, as the libelant claims to recover under the statute of this state (Or. Civ. Code, sec. 367), which provides: "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damage therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

But the point is made by counsel for the defendant, that the Oregon statute provides that the damages for the death shall be recovered by an action at law, and therefore they can not otherwise be obtained, as by a suit in admiralty. But the right conferred by the statute, in whatever form of words, is essentially separate and distinct from the remedy; and it may be enforced in the proper national court, according to the procedure of that forum.

In *The Highland Light*, *supra*, 154, it was held that the widow and son could maintain a suit in admiralty to enforce a right to damages given by a similar statute of Maryland, for the death of the husband and father caused by a tort committed upon the navigable waters of that state. In speaking of the statute, the chief justice says: "The right is quite separate from the remedy. The right, like that of a statute lien upon a vessel for repairs in home ports, may be enforced in admiralty by its own processes. It is not necessary to pursue the statutory remedy in order to enforce the statutory right. It is clear, therefore, that for an injury such as that proved in this case, the wife and son of the man killed may have redress in admiralty."

In *Steamboat Co. v. Chase*, *supra*, 531, Mr. Justice Clifford, in discussing the question, said: "Doubts, however,

may arise, whether the action survives in the admiralty, and if not, whether a state statute can be regarded as applicable in such a case to authorize the representatives of the deceased to maintain such an action for the benefit of the widow and children of the deceased. Undoubtedly the general rule is, that state laws can not extend or restrict the jurisdiction of the admiralty courts, but it is suggested that the action may be maintained in this case without any departure from principle, as the only practical effect allowed to the state statute is to take the case out of the operation of the common law maxim, that personal actions die with the person."

But in *Railway Company v. Whitton*, 13 Wall. 270, which was an action brought to recover damages for the death of a person upon a statute of Wisconsin, that provided whenever the death of a person is caused by "the wrongful act, neglect or default of another," the person or corporation which would have been liable for the injury, if death had ensued, "shall be liable to an action for damages," not exceeding five thousand dollars—"provided that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of this state," the supreme court held that an action to recover the damages might be maintained in the national circuit court for Wisconsin, notwithstanding the limitation of the state statute. In delivering the opinion of the court, Mr. Justice Field, after admitting that the "right of action exists only in virtue of the statute" and in the cases therein specified, says: "In all cases when a general right is thus conferred, it can be enforced in any federal court within the state having jurisdiction of the parties. It can not be withdrawn from the cognizance of such federal court by any provision of state legislation, that it shall only be enforced in a state court. * * * Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a federal court, in a case between proper parties, is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation."

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Assuming that the right of action dies with the person in admiralty, as at common law, then in my judgment the case is in all respects analogous to those arising under state statutes giving a lien upon a domestic ship for repairs—giving half pilotage for an offer of pilotage services, or a right to a party in possession of land to maintain a suit against any one setting up an adverse claim thereto for the purpose of having such adverse claim determined. In all these cases the local law gives the right, which, like other rights, may be enforced in the proper national court, depending upon its nature or the citizenship of the parties.

If a state gives an alien a right in lands which the common law does not give him, such alien may assert such right in the national courts as well as those of the state. The jurisdiction does not depend upon the origin of the right, but the fact of the right and the citizenship of the parties. The rights of parties generally have their origin in the laws of the state, and therefore such laws furnish so far the test and measure of such rights, whether prosecuted or defended in the national or state courts. (*The Orleans*, 11 Pet. 184.)

The question of whether the state or national tribunals have jurisdiction, does not always depend upon the state or national origin of the right or title in question. If the plaintiff's citizenship is different from that of the defendant, he has a right to sue in the circuit court of the United States, whether the right he asserts is of state or national origin. For the same reason, if a right is of admiralty jurisdiction, it is cognizable in the district courts, without reference to the residence of the parties, or the origin of the right. The maxim that the state can not enlarge the jurisdiction or control the process of the national courts, is admitted. But, certainly, it may increase the cases in such courts by enlarging the class of persons or things included in their jurisdiction.

For instance: By the general maritime law of the United States, material-men have no lien upon a vessel for supplies furnished her in the home port, but in the absence of legislation by congress, the state may give a lien in such cases, and the contract and service being a maritime one, the

right thus acquired, may be enforced in the district court. (*The Planter*, 7 Pet. 324; *The Lottuwan*, 21 Wall. 579.)

Congress, by virtue of its power to regulate commerce, may pass laws governing pilots and pilotage. But until it does so, the state may make regulations on the subject. Suits for pilotage are of admiralty jurisdiction; but by the general maritime law, compensation can not be recovered upon a mere tender and refusal of pilot services. Yet many of the states having found it necessary in maintaining a body of skillful and daring pilots upon the pilot grounds within their limits, to provide that the pilot first tendering his services to a vessel thereon should receive, if refused, half pilotage, there was thus created in favor of the pilot so tendering his services, a claim for pilotage which belonged to the admiralty jurisdiction, and might be enforced in the district court. The origin of this right is in the state law, but the nature of it authorizes the party in whose favor it exists, to sue in the admiralty court. (*The Wright*, 1 Deady, 597; *The California*, 1 Saw. 467; *The Steamship Company v. Joliffe*, 2 Wall. 457; *Ex parte McNiel*, 13 Id. 236.) In the last case, 243, Mr. Justice Swayne, speaking for the court, says: "It is urged further, that a state law could not give jurisdiction to the district court. That is true. A state law can not give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy."

Owing to the anomalous state of the titles to land in Kentucky, a statute of that state, passed in 1796, gave to the person in possession of real property, and having a title thereto, the right to maintain a suit in equity against any person setting up a claim thereto for the purpose of determining such claim, without being compelled to wait for such person to assert such a claim at law.

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This statute enlarged the class of cases in which a party was entitled to relief in a court of equity, by obtaining a decree to quiet the title to lands. Proving beneficial, the substance of it has since been adopted in many of the states, and now constitutes section 500 of the Or. Civ. Code. It gave a new right, which from its nature was, and is, properly enforceable in a court of equity, as well of the nation as the state, wherever the citizenship of the parties gives the former jurisdiction. (*Curtis v. Suttler*, 15 Cal. 262.) In *Clark v. Smith*, 13 Pet. 200, the supreme court held that the right conferred by this statute could be asserted in the courts of the United States, as well as in those of the state. In *Lorman v. Clark*, 2 McLean, 569, the court held that a statute of Michigan which gave a judgment creditor the right to maintain a suit in equity, to subject his debtor's property to the payment of the judgment, was a right which could be enforced in the courts of the United States, saying, "the courts of the United States, in the exercise of their chancery powers, will enforce equitable rights, whether they originate by contract, by local usage, or by the statutes of the state." The case of *Fitch v. Creighton*, 24 How. 160, is to the same effect.

Some question is made by the defendant as to the right of the administrator existing by virtue of the laws of Oregon to maintain this suit in this forum, and the case of *Muckay v. The Central Railway of New Jersey*, is cited by counsel in support of the objection. This was a case on all fours with the one under consideration, except that the action was at law in the circuit court of New York under a statute of New Jersey, while the plaintiff was appointed administratrix of the deceased under the laws of New York. The court held that the right of the New York administrator was limited by the laws of New York and that the right to recover the damages on account of the death of the deceased was only conferred by the statute of New Jersey upon an administrator appointed under its laws, and therefore dismissed the action. But no question was made but that an administrator appointed under the laws of New

Jersey might maintain an action upon the statute in the proper United States court. But, in this case, the plaintiff is appointed administrator under the laws of Oregon, and the statute in question expressly confers upon him the right to recover damages for the death of his intestate. He sues as the trustee of an express trust to recover a fund for the benefit of those among whom the law will distribute the estate of his intestate.

It is also objected that it is not explicitly stated in the libel that the death was caused without the fault of the deceased. The libel states that the death was caused by the negligence of the defendant, and details the facts and circumstances of the transaction, from which it reasonably appears that it must have occurred wholly from such negligence. My impression is that the libel is sufficient in this respect, and that if the defendant wants to raise the question of contributory negligence on the part of the deceased, it must do so by a defensive allegation to that effect. (*Railway Co. v. Gladmon*, 15 Wall. 406.)

The only case cited upon this point is *Murphy v. The C. R. I. & P. R. Co.*, 14 Iowa, 661. In this case the contributory negligence of the deceased appears to have been pleaded as a defense, but upon the close of the plaintiff's evidence, the court below, upon the motion of the defendant, directed the jury to find for it, because it appeared from such evidence that the deceased was "guilty of such negligence as contributed proximately to the accident," and this instruction was affirmed on appeal. The case is not in point. In the judgment of the court, the plaintiff's evidence anticipated and established the defendant's defense.

In conclusion, the tort which caused the death of Perkins having occurred upon a navigable water of the United States, is a marine one, and even if the maritime law does not give a remedy for the wrong, the law of the state having given the right to the administrator to recover damages therefor, this court as a court of admiralty has jurisdiction of a suit to enforce such right.

These exceptions are also disallowed.

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The case was this day finally heard upon the libel and answer, and the testimony of the parties.

DEADY, J. The answer of the defendant, in addition to the allegations directly responsive to the libel and contesting the cause of suit therein stated, contains defensive allegations in bar of the same, which are the equivalent of the pleas of *ne unques* administrator and a prior adjudication at law.

These pleas are but different forms of the same defense, and the facts upon which they rest are as follows:

In June, 1877, William A. Perkins, then in his twenty-second year, came to Jackson county, Oregon, *via* California, from his native state, Vermont, with his mother and step-father, Michael Riggs, where he remained until September 10, 1878, when the mother, on account of alleged cruel treatment, left Riggs, taking her three minor children with her and the effects which belonged to her, and started for California, where she had a brother living, with the ultimate purpose of going back to Vermont to reside, where she had a son still older than the deceased. The deceased accompanied her, first disposing of a pre-emption claim on Applegate creek, upon which he and his mother had resided separate from Riggs for some months, and leaving nothing behind him.

At Roseburg they were detained by sickness and poverty until October 10, 1878, when they came to Salem, where, for the want of means to pursue their journey, they remained until November 16, when, by aid of others, they started for California on the defendant's railway, and on the evening of the same day, while crossing the river at Portland, the deceased was drowned.

On December 2, 1878, the county court of Multnomah county, upon the proper petition of the mother of the deceased, styling herself "Mary A. Riggs, of the city of Portland," in which it was alleged "that the deceased was, at or immediately before his death, an inhabitant of said county," made an order appointing H. W. Davis administrator of the

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estate of said William A. Perkins, in which among other things it is alleged that by "the oath of the petitioner" it was "proved" that said Perkins died intestate in Multnomah county, Oregon, he "being at or immediately before his death, an inhabitant of said county," which order and appointment are still in full force and effect; and said Davis, in pursuance thereof, duly qualified as such administrator, and on January 2, 1879, brought an action at law in the circuit court of the state for said county against the defendant, under section 367 aforesaid, for the identical cause of suit alleged in the libel herein, in which, on March 31, said circuit court gave judgment that the plaintiff take nothing thereby, which judgment was, on August 11, 1879, duly affirmed by the supreme court of the state, and still remains in full force and effect.

On September 17, 1879, the county court of Jackson county, Oregon, appointed the libelant administrator of the estate of said Perkins, and in pursuance thereof the libelant duly qualified as such administrator, and brought this suit to recover damages for the death of his intestate. Upon these facts the plea of a prior adjudication is not sustained. For although the action of *Davis v. The O. & C. Ry. Co.* was for the same cause as this, it was between different parties plaintiff, who were not privies. The Jackson county administrator is not the successor of the Multnomah one. On the contrary, he claims title to the estate of the deceased by a distinct and independent, if not an adverse grant. His suit proceeds upon the assumption that Davis was not the administrator, and that therefore his action to recover damages belonging to the estate of the deceased was a nullity and of no effect.

The defense, that the libelant was "not ever administrator" of the deceased, involves the inquiry: 1. Did the county court of Multnomah county have jurisdiction to grant the administration of the estate of the deceased to Davis when and as it did? 2. Can the decree of said court making said grant be attacked collaterally?

The jurisdiction to grant letters of administration upon Perkins' estate was vested in the county court of the county

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of which the deceased, “at or immediately before his death, was an inhabitant,” “in whatever place he may have died.” (Or. Civ. Code, secs. 1051, 1053.)

And first, as to the fact—of what county was the deceased “an inhabitant” at or immediately before his death? In the consideration of this question counsel for the libellant assumes that habitation and domicile are in this case convertible terms, and that therefore a person is always an inhabitant of the place in which he has a domicile and *vice versa*. But I do not think that the term “inhabitant” as used in the statute is the equivalent of the technical term domicile.

A habitation is a place of abode—a place to dwell in; and an inhabitant of a place is one who has an actual residence there. But a person’s domicile is a place where he may reside in fact, or for many purposes may be deemed to reside. Indeed, a person may have two domiciles at once; “as, for example, if a foreigner, coming to this country, should establish two houses, one in New York and the other in New Orleans, and pass one half the year in each, he would for most purposes have two domiciles.” (Bouv., Domicile.)

A man’s domicile, as the word implies, is his house, his home, and it may continue to be such for years, without being actually inhabited by him. But an inhabitant of a place is one who ordinarily is personally present there; not merely *in itinere*, but as a resident and dweller therein. Domicile, as a question of fact, is often one of great difficulty to determine. Yet, in contemplation of law, every one has a domicile somewhere, because upon it generally depends his personal status, rights, and duties, and the disposition of his property after his death. (*Abington v. North Bridgewater*, 23 Pick. 176; *Mitchell v. U. S.*, 21 Wall. 351; *Desmare v. U. S.*, 3 Otto, 609.) Furthermore, a person, who, in contemplation of law, has a domicile, may nevertheless, as a matter of fact, be a mere wanderer and not an inhabitant of any place.

Upon this view of the law, I do not think that Perkins can be considered an inhabitant of Jackson county at the time of his death, nor indeed of any county in the state.

As a matter of fact he had ceased to reside in Jackson county, and was journeying through the state to California. Therefore the power to grant letters of administration upon his estate belonged to the court of the county, if any, of which he was an inhabitant immediately before his death. He was an inhabitant of Jackson county before his death, but I doubt if he was immediately before. Immediately means without anything intervening—the very opposite of mediately. In this statute it signifies that the administration shall be granted in the county of which the deceased was an inhabitant at or last before his death.

The six weeks immediately preceding his death Perkins lived in Marion county, and although he did not intend to remain there permanently, but only until his mother could obtain the means to get away with, yet I am inclined to the opinion that that was the last county he was an inhabitant of before his death; if it was not, then Jackson county was.

However that may be, I do not think Perkins was an inhabitant of Multnomah county at the time of his death, and therefore as a matter of fact the county court of that county was not authorized to grant letters of administration upon his estate. And this brings us to the consideration of the principal question: Can the decree of the county court granting the letters of administration to Davis be attacked collaterally?

By the constitution of the state (art. 7, secs. 1, 11, and 12) it is provided in effect, that the county court shall be “a court of record having the general jurisdiction” “pertaining to probate courts,” to be limited by law; and by section 869 of the Civ. Code it is declared, that such court “has the exclusive jurisdiction in the first instance, pertaining to a court of probate—to grant and revoke letters of administration.”

In *Tustin v. Gaunt*, 4 Or. 305, the supreme court of the state held that the county court, in exercising the jurisdiction pertaining to probate courts, is a court “of superior jurisdiction, as contradistinguished from courts of inferior and limited jurisdiction;” and that its “judgments and proceedings,” when questioned collaterally, are entitled to all the pre-

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sumptions of law in favor of their legality that pertain to the judgments of superior courts.

In the case of a judgment of a superior court—a court of record—the law presumes that the court had jurisdiction, unless the contrary appears; and in the courts of the same state, it has usually been held that unless the contrary appears from the record of the case, it can not be shown at all. In other words, the validity of the judgment and the jurisdiction of the court that pronounced it, must be tried by the record alone. But the record of a judgment of a court of a state may be contradicted in the courts of a sister state or the United States, as to the facts necessary to give jurisdiction, and if it be shown that such facts did not exist, the record, notwithstanding its recitals to the contrary, is a nullity. (*Thompson v. Whitman*, 18 Wall. 457; *Pennoyer v. Neff*, 5 Otto, 714.) And the same rule has lately been applied by the New York court of appeals to domestic judgments. (*Ferguson v. Crawford et al.*, 70 N. Y. 253.)

Assuming this to be the rule governing this case, the contention of the libellant is:

1. The county court of Multnomah county had not jurisdiction to grant the letters of administration upon Perkins' estate, as it did, unless he was an inhabitant of such county at and immediately before his death;

2. It appears that Perkins was not ever an inhabitant of said county; and,

3. Therefore the court acted without jurisdiction, and this fact may be shown to contradict the record of Davis' appointment, and thereby destroy its validity.

Upon what fact or facts the jurisdiction of a court to grant letters of administration upon the estate of a deceased person depends, is a nice and vexed question, upon which the authorities are in direct conflict.

At common law, the grant of letters by the bishop, when, by reason of the locality of the *bona notabilia* of the deceased—the equivalent of inhabitancy—the power did not belong to him, was void, but when made by the metropolitan, under like circumstances, it was only voidable. (Toller on Ex. 53.)

In Massachusetts, in *Cutts v. Haskins*, 9 Mass. 543, it was held that the grant of administration by a judge of probate on the estate of a deceased person, not at his death an inhabitant of the county in which such administration was granted, was simply null and void. This ruling was followed in *Holyoke v. Haskins*, 5 Pick. 20, and 9 Id. 259, when the legislature intervened and declared that the jurisdiction assumed by a probate judge, so far as it depends upon the place of residence of any person, shall not be contested, except directly upon appeal, unless the want of jurisdiction appears upon the record. (R. S., c. 83, sec. 12.)

To the same effect is the ruling in *Becket v. Selover*, 7 Cal. 233; and in *Fletcher v. Wier*, 7 Dana, 345, it was held that the decree of a probate court admitting a will to probate was *prima facie* evidence of its jurisdiction, which, it was said, might be overcome by showing that the testator was not domiciled in the state.

On the other hand, it has been held, that where a probate court grants letters of administration upon a petition which states the facts necessary to give the court jurisdiction, the decree of the court is not void and can not be questioned collaterally, although the residence of the deceased at or last before his death was not, in fact, in the county where the letters were granted. Such has been the ruling in Virginia, *Fisher v. Bassett*, 9 Leigh, 119; *Andrews v. Ivory et al.*, 14 Gratt. 236; in Vermont, *Abbott v. Coburn and wife*, 28 Vt. 667; in Texas, *Burdette v. Silsbee*, 15 Tex. 615; in Missouri, *Johnson v. Benzley*, 65 Mo. 264; in Alabama, *Collart v. Allen*, 40 Ala. 155; in California, *Irwin v. Scriber*, 18 Cal. 503; and in New York, *Bumstead v. Read*, 31 Barb. 664; *Bolton v. Brewster*, 32 Id. 393.

The reasons given for these rulings are not always the same or even harmonious. The subject is not a simple one, and affords a good opportunity for subtlety and refinement. All the cases, however, have gone, more or less, upon the argument of convenience, and the fact that any other rule is impracticable, and would leave all rights dependent upon

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or growing out of the grant of letters of administration in an unsettled and precarious condition.

But in my judgment, the conclusion reached in these cases is legally correct, as well as practically just.

The county courts of Oregon have the general and exclusive jurisdiction to grant letters of administration upon the estates of deceased persons, to be exercised, however, by each county court only in cases where the deceased was an inhabitant of that county, at or immediately before his death.

The subject-matter, the granting of administration upon the estate of a deceased person without an administrator, is within the general jurisdiction of every county court in Oregon, but the exercise of it, in particular cases, depends upon the existence of particular facts, which must be ascertained by the court in the manner prescribed by law, and in the exercise of its admitted jurisdiction to grant letters of administration in the cases enumerated in the statute.

But, if the person is not dead, or the administration of his estate has already been disposed of, then the subject-matter is not within the jurisdiction of the court; it does not exist, and a decree appointing an administrator in such case is simply void.

I am aware that the court of appeals of New York (*Roderigas v. E. R. S. Institution*, 63 N. Y. 460), by a bare majority, have held that a grant of administration by a surrogate was a judicial determination of the death of the person upon whose estate administration is granted, and conclusive evidence of the authority of the administrator to act until the letters were revoked or the order granting them set aside on appeal, "so far, at least, as to protect innocent persons acting upon the faith of them."

But this decision, notwithstanding the plausible arguments in support of it, is, as Judge Redfield remarked (5 Am. Law Reg. 213), "without a precedent in English or American jurisprudence;" and the responsibility for it is practically laid upon the statute of the state, which is said to require the surrogate in all cases to hear evidence and determine the question of death before granting the letters.

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may arise, whether the action survives in the admiralty, and if not, whether a state statute can be regarded as applicable in such a case to authorize the representatives of the deceased to maintain such an action for the benefit of the widow and children of the deceased. Undoubtedly the general rule is, that state laws can not extend or restrict the jurisdiction of the admiralty courts, but it is suggested that the action may be maintained in this case without any departure from principle, as the only practical effect allowed to the state statute is to take the case out of the operation of the common law maxim, that personal actions die with the person."

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Assuming that the right of action dies with the person in admiralty, as at common law, then in my judgment the case is in all respects analogous to those arising under state statutes giving a lien upon a domestic ship for repairs—giving half pilotage for an offer of pilotage services, or a right to a party in possession of land to maintain a suit against any one setting up an adverse claim thereto for the purpose of having such adverse claim determined. In all these cases the local law gives the right, which, like other rights, may be enforced in the proper national court, depending upon its nature or the citizenship of the parties.

If a state gives an alien a right in lands which the common law does not give him, such alien may assert such right in the national courts as well as those of the state. The jurisdiction does not depend upon the origin of the right, but the fact of the right and the citizenship of the parties. The rights of parties generally have their origin in the laws of the state, and therefore such laws furnish so far the test and measure of such rights, whether prosecuted or defended in the national or state courts. (*The Orleans*, 11 Pet. 184.)

The question of whether the state or national tribunals have jurisdiction, does not always depend upon the state or national origin of the right or title in question. If the plaintiff's citizenship is different from that of the defendant, he has a right to sue in the circuit court of the United States, whether the right he asserts is of state or national origin. For the same reason, if a right is of admiralty jurisdiction, it is cognizable in the district courts, without reference to the residence of the parties, or the origin of the right. The maxim that the state can not enlarge the jurisdiction or control the process of the national courts, is admitted. But, certainly, it may increase the cases in such courts by enlarging the class of persons or things included in their jurisdiction.

For instance: By the general maritime law of the United States, material-men have no lien upon a vessel for supplies furnished her in the home port, but in the absence of legislation by congress, the state may give a lien in such cases, and the contract and service being a maritime one, the

authorized to determine the controversy between them, its decision in this respect is conclusive except upon appeal.

The object to be accomplished by means of giving exclusive jurisdiction to the county courts to grant administration of estates is to provide for the due and public succession to the estates of all deceased persons, and in the exercise of this jurisdiction the residence of the deceased is merely a matter incidental, and only of importance in providing for what may be supposed to be the orderly and convenient distribution of the power among the several county courts of the state.

The argument drawn from convenience and practicability in favor of holding the judgment of a court granting administration of an estate to be conclusive, as to the residence of the deceased, except upon appeal, is very suggestive and ought to have much weight. Cases are continually arising in which it is difficult to say where the last residence or inhabitancy of the deceased was. The facts upon which the decision of the question turns are often so obscure, vague and ambiguous, or contradictory, that no two courts can hardly be expected to draw the same conclusion from them. And yet its decision is a mere matter of form—relates only to the procedure—and involves no substantial right. Apart from the local convenience of parties, it makes no difference what county court of the state grants the administration.

The case under consideration is a striking illustration of the difficulty of deciding what was the last residence of a deceased person, for the purpose of granting administration upon his estate; and what useless confusion, litigation, and loss would follow, if the judgment of the county judge upon such a question was open to attack collaterally, whenever and wherever any right of action or property arising out of or depending upon the correctness of such judgment was contested or called in question.

Within the seventy days immediately prior to his death, Perkins was in four counties of the state. Already administration has been granted in two of them, upon applications made under the advice of learned and careful counsel. And if I were called upon to decide of which county he

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was an inhabitant, at or immediately before his death, I should probably say, not either of these, but Marion county.

So that if the rule contended for by the libelant were to prevail, and the grant of administration be held void, in case it appears to this court that it was not made in the proper county, the conclusion might be, that neither Davis nor Holmes is the legal administrator of the deceased.

But I do not think the residence of the deceased is an open question in this court. In the exercise of its general jurisdiction over the estates of deceased persons, the county court of Multnomah county in the appointment of Davis, as administrator, decided that the deceased was an inhabitant of that county at the time of his death, and this decision, except upon appeal, is conclusive of the question.

The grant of administration to the libelant having been made upon an estate which was not vacant, but already vested in the administrator appointed by the court of Multnomah county, it follows that such grant is void, and the plea of *ne unques administrator* is sustained. This conclusion also derives support from the analogies of the following cases relating to the question of jurisdiction in probate courts and matters: *Grignon v. Astor*, 2 How. 335; *Florentine v. Barton*, 2 Wall. 210; *Comstock v. Crawford*, 3 Id. 402; *Cunjolle v. Ferrie*, 13 Id. 469; *Broderick's Will*, 21 Id. 509; *Mohr v. Munierre*, 11 Otto, 417; *Dequindre v. Williams*, 31 Ind. 453; *Stroyer v. Richmond*, 16 Ohio St. 465; *Wanzer v. Howland*, 10 Wis. 15; *Gager v. Henry*, 5 Saw. 237.

The decision upon this plea is sufficient to dispose of the case in this court; but the defendant having also contested it upon the merits, and the case being liable to an appeal and to be considered in the appellate court upon the merits, where the conclusions of the district judge upon the evidence are to be regarded as findings of fact drawn not merely from reading the notes of the witnesses' testimony, but a knowledge of the *locus in quo* and a careful observation of the manner and appearance of the witnesses while undergoing examination—circumstances which so often qualify and sometimes contradict their verbal statements—I will proceed to dispose of the remaining two questions in

the case: 1. Did the deceased come to his death by the wrongful act or omission of the defendant, and without substantial fault on his part? and, 2. If he did, what damages ought his administrator to recover under the statute therefor?

Upon the first point, a brief statement of the facts will suffice. On the morning of November 16, 1878, the deceased, in company with his mother, brother, and two half-sisters, left Salem for Portland, on the defendant's railway, which usually arrived at the depot on the east side of the Wal-lamet river at 4 o'clock P. M., but on this occasion was delayed at Oregon City about two hours by a freight train getting off the track. The night was dark and wet. The passengers, baggage, and mails were then transferred to the defendant's ferry-boat, the deceased and his family walking from the depot to the boat, a distance of about one hundred and twenty-five yards. The boat was under the direction of a pilot stationed in the pilot-house, five or six feet above the level of the deck and about thirty-three feet back of the bow. There was only one light on deck, and that was an ordinary hand-lantern, carried by the watchman, the only employee on deck. The deck immediately in front of the pilot-house was about thirty-eight feet wide, and upon either side there were railings running forward about twenty-nine feet. Between the forward end of these railings the deck was twenty feet across, and from there to the end of the boat, a distance of eight feet, there was no rail or guard; neither was there any chain, gate, or guard across the deck, or any like means, to prevent the egress of passengers at, or before landing.

On the Portland side of the river the boat landed at a pontoon, about forty feet wide, with a circular recess in front of it, about twenty feet across and eight feet deep in the center, into which the bow of the boat was run, and then fastened by a line taken from the boat on the port or upper side, at or near the end of the railing, and belayed to a kevel on the upper side of the pontoon, about ten feet from the boat, and then an apron about twelve feet in length, was turned over from the front of the former on to

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the bow of the latter, which served as a bridge upon which wagons crossed the joint or slight opening between the boat and pontoon; while the foot passengers usually stepped off from the former on to the latter, anywhere within the circle.

The cabin was in the middle of the boat, running fore and aft, with a pilot-house at either end, and a wagon-way on either side, with a stairway at each end ascending between the house and the cabin—the one then next to the shore from the port side. While crossing the river, the deceased and the family, with two or three others, occupied the cabin, which was lighted; but the light did not produce any effect forward of the pilot-house. The mail wagon, drawn by two horses, was on the port side roadway, and nearly abreast of the stairway leading into the cabin.

On this occasion, owing to the darkness, the boat did not make the landing at the pontoon direct; but ran in from down the stream, and at an angle of about fifty-seven degrees, with the line of its face, and went hard up against the pontoon at each end of the circular recess therein, leaving a crescent-shaped space between it and the pontoon and these points of about eighteen inches in width at the center.

As soon as the boat struck the pontoon, the watchman stepped on to the upper side of it, sat down his lamp, and made the line fast to the keel; and at the same time most of the passengers, probably twenty or thirty, who were standing on the deck forward of the pilot-house, went ashore, as was usual in the day-time, some on the upper and others on the lower side of pontoon where it and the boat touched or came close together, without objection or direction from any one. From the pontoon the street ascends the hill to Front street, a distance of probably two hundred feet. Near the foot of the hill some hotel hacks were standing, one or two of which had lights shining towards the river, and upon the further side of Front street, and about thirty-five feet above the level of the river, stood a street lamp. Besides these and the watchman's lantern, there were no lights at the landing or in the vicinity. On the pontoon there were

a number of hotel runners, making the air ring with the names and advantages of their respective houses.

Neither the defendant nor the family had ever been at Portland or had any knowledge of the landing or its surroundings. As soon as the boat struck the pontoon, and the passengers on the deck began to go ashore, the deceased, who had reason to believe the boat was landed, went down from the cabin to go ashore. He had a sack of clothes on one arm and a valise in the other hand; and as he reached the deck and passed forward he disturbed the off horse in the mail wagon, and the animal, being skittish or vicious, jumped or kicked, whereupon the driver railed out at him, telling him with much profanity to stand back, or take care, or he would get hurt. With this the deceased, who was now at the front of the pilot-house, diverged a little to the right, and saying "I am all right," walked forward to the starboard quarter of the bow, a few feet forward of the end of the rail, and undertook to step off on to the pontoon, but struck his toe against the latter instead of stepping on it, and thereby fell into the river through the space between the pontoon and the boat, which was there from eighteen inches to two feet wide, and was drowned. Upon this state of facts it is too plain for argument that the deceased came to his death by "the wrongful omission," the negligence, of the defendant.

The defendant was a common carrier of passengers for hire, and for their protection was subject to a very strict responsibility. Therefore he was bound to provide for the safety of the deceased while upon his boat and getting on shore "so far as was practicable by the exercise of human care and foresight." (*Shoemaker v. Kingsbury*, 12 Wall. 376.) To this end, it was certainly its duty to have had its boat and landing, particularly the latter, well lighted, and to have maintained a guard or gate across the bow of the former to prevent passengers from debarking before the landing was fully made, and to have signified to the passengers in some suitable and sufficient manner—as by the ringing of a bell—when it was safe and proper to go ashore.

But all these precautions were substantially omitted, and

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although the fact that the boat did not usually cross the river at night, may, in some measure, excuse those in the immediate charge of the boat for the omission, it does not exonerate the defendant from the legal effect thereof.

But the defendant claims that the deceased was duly warned not to go ashore when and as he did, and that his disregard of such warning was the cause of his death, or substantially contributed to it; and, also, that he was intoxicated at the time of his death, and incapable of apprehending or avoiding the danger which caused the loss of his life.

Contributory negligence is a defense to this action. (*The Chandos*, 4 Fed. Rep. 649.) But the burden of proof is upon the defendant to establish it. I admit the authorities are in hopeless conflict upon this question, but in my judgment any other rule than this violates all the analogies of the law, and is practically illogical and unjust. (See 2 Thomp. Neg. 1175, sec. 24.)

The evidence in regard to the warning and intoxication comes from the witnesses of the defendant, and must be taken with many grains of allowance, besides being substantially contradicted by those of the libellant.

The witnesses of the defendant from whom this evidence comes are its employees or persons habitually traveling on its road in connection with the transportation of the mail or engaged as solicitors for hotels, that receive a large share of their patronage from the travel over this road. They are evidently more or less in sympathy with the defendant or its representatives, who are persons of standing and influence in this community, while the deceased was a poor stranger, without friends or influence. The circumstances to which many of them speak occurred in a crowd on the boat and the pontoon, when the deceased was utterly unknown to most of them, while the darkness and confusion was such as to prevent accurate or reliable observation or apprehension of what did take place.

Upon the question of intoxication, my conclusion is, that while the train was delayed at Oregon City, the deceased became partially intoxicated, but not so as to render him at all helpless or unconscious, but that before he reached

the ferry-boat, the effect of the liquor had practically passed away. He appears to have gone back and forth on the train during the passage from Oregon City without difficulty. He also appears to have gotten down from the cars at the depot and walked to the ferry-boat and sat in the cabin while crossing the river, without any trouble or attracting the attention of those in his immediate presence and company. It is admitted that intoxication is evidence of contributory negligence, and in some cases may be sufficient to establish it. But it is not admitted, that under the circumstances of this case, if the deceased had been staggering drunk, the defendant would not be liable for his death. The defendant received him on its boat without objection, and if he was palpably drunk, it was bound to take care of him accordingly.

In *Robinson v. Pioche*, 5 Cal. 460, which was an action for damages sustained by the plaintiff's falling into an uncovered hole, dug in the sidewalk, in front of the defendant's premises, and taken to the supreme court upon an exception to the charge in the court below, to the effect that if the intoxication of the plaintiff was one of the causes of the injury, he could not recover. Heydenfelt, J., in delivering the opinion of the court for reversal, said: "If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff can not excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it."

As to the warning, admitting for the present that the defendant might by this means excuse itself for the want of light, guard, and signal for landing, the proof is not satisfactory that any distinct warning not to go ashore was given to the deceased that he was bound to recognize, as intended for him or as coming from any one authorized to direct or interfere with the conduct of the passengers. The objurgation of the driver of the mail wagon is claimed to have been a sufficient warning, but apart from the fact that he was only a passenger, the fair inference from all the circumstances is that what the driver said was occasioned by and

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confined to the alleged interference of the deceased with his horse. The pilot, Charles F. Jones, who under the circumstances appears to be a fair witness, did call out from the pilot-house, and probably as the deceased was going forward, "to stand back." But there is no evidence that the call was particularly intended for the deceased, or if it was that he had any reason to think so, or even that he heard it. There were other persons in front of the pilot-house, also going forward, as well as the deceased. The deceased was a stranger to the boat, the place, and the manner of proceeding. He saw the great bulk of the passengers had gone off, and if he heard the call he might as well have understood it as applicable to the hotel runners on the edge of the pontoon waiting to catch the rest of the passengers.

Some of the witnesses on shore, also state that they cried, "Stand back," intending it for the deceased, without, however, mentioning any name. But their testimony upon this point is vague and indefinite, and upon other points where the facts are clear, some of them are much mistaken. One, in particular, states that the boat was fastened upon the lower side of the pontoon, while there is no doubt that it was fastened on the upper side, and that the passengers got off on the lower side, when it is equally certain that the greater number got off on the upper side. Most of them represent the gap between the boat and pontoon, when and where the deceased went off, as from three to six feet wide, and that the boat was backing at the time. But the admitted circumstance, that the boat was made fast as soon as she touched the pontoon, and remained so without slacking the line, proves that she could not have backed; and completely disproves the conjectural and reckless statements to the contrary. Besides, the pilot swears positively that he did not back the boat, but only swung her stern up stream to bring her into a right line with the pontoon, so, I infer, as to make a close connection and allow the wagons to go off.

Another fact stated by one of the defendant's witnesses, P. G. Glisan, satisfactorily disposes of these extravagant

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statements, as to distance between the boat and the pontoon and the imputation founded upon them, of recklessness on the part of the deceased in attempting to cross such a chasm. He says the deceased attempted to get off the bow of the boat just opposite where he was standing on the pontoon, and that the gap between the two was about eighteen inches, just "a good step across;" that as the deceased approached him he called to him "to stand back," and thought to put his hand on him and hold him on the boat, but before he could do so, the deceased stepped off, and as he did so, struck his foot on the pontoon and fell; that as he fell the witness reached forward and caught him by the coat, but could not hold him, and he fell down into the water, some six or seven feet below.

Under the circumstances any witness is very liable to be mistaken as to the width of the gap between the boat and the pontoon—particularly after the lapse of two years—but the fact that the deceased stepped from the one to the other in Glisau's immediate presence, and that he caught Perkins by the coat as he fell between them, is a matter he can not well be mistaken about. The most probable conclusion, then, is, that the space between the boat and the pontoon, when and where the deceased attempted to cross it, was about eighteen inches. But it is also highly probable that it was less than this, if anything, just before the deceased reached it.

When the pilot saw that the passengers on the forward part of the boat had gotten off, he commenced working his wheels to swing the stern up stream, and this naturally increased the opening on the lower side; and so it was that the deceased, unconscious of this fact as he walked forward in the comparative darkness, encountered a chasm between the boat and pontoon in the place where others had just crossed in safety, wider than he had reason to expect or was aware of. True, the pilot, when he commenced swinging around, being aware of the opening he was making between the pontoon and the boat, called out, "stand back." But the order was directed to nobody in particular, and coming as it did from above and behind the deceased in a voice un-

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known to him, it is not likely it was understood or recognized by him as being applicable to persons in his situation. There ought to have been some one on deck to apply and enforce the order, or some guard or gate to prevent passengers from going forward of the railing until the landing was completed; and above all, there ought to have been light enough in the vicinity to have made the situation apparent to every one on board. This particular omission was the negligence which caused the death.

The libellant contends that the damages ought to be exemplary, and that they ought to be estimated for the sufferings of the deceased and the injury to the feelings of the survivors, as well as the pecuniary loss to his estate. The sufferings of the deceased were merely momentary, and could hardly become the subject of damages under any circumstances; nor do I think that either of these grounds of damages are within the statute.

It provides, that "when the death of a person is caused by the wrongful act or omission of another," under the circumstances of this case, the personal representatives of the deceased may maintain an action therefor; "and the damages therein shall not exceed five thousand dollars; and the amount recovered, if any, shall be administered as other personal property of the deceased."

The damages are a part of the general assets of the estate of the deceased, and belong first to the creditors and second to the next of kin, or persons among whom the law provides the present estate shall be distributed. It would indeed be a new way of paying old debts, if the tears and anguish of the survivors could be thus converted into assets for the payment of the creditors of the deceased.

In this case it is admitted that there are no creditors; and the deceased being a single man, without a father, his next of kin, or the distributees of his estate, under the statute of the state, are his mother, brother and sisters, in equal parts. (Or. Laws, pp. 547, 548, sec. 3, subd. 3.)

Under similar statutes of other states, it has been generally held, that the rule upon which damages should be assessed in this class of cases is, as for a pecuniary injury,

and not a *solatium*, or solace for wounded feelings or mental suffering. (2 Thomp. Neg. 1289, sec. 90.)

The nearness of the relation between the deceased and those for whose benefit the damages are claimed, and the nature and strength of the obligation of the former to care for the latter, are to be considered in estimating the damages; and the more distant the relation, or the weaker the obligation, the less they should be.

The age, health, habits of industry and sobriety, and mental and physical skill of the deceased, so far as they affect his capacity for rendering useful service to others, or acquiring property, must also be considered.

Under the statute, the life of the deceased is valued according to his capacity and disposition to be useful—to labor and to save.

The industrious, provident, and skilled are worth more to society than the indolent, improvident, and ignorant, and their death is to be compensated for accordingly.

This is the law, and as will be seen, it makes no account of sentiment or feeling; and yet while it is administered by fallible human beings, whether on the bench or in the jury box, the chances are that a feeling of pity for the bereaved or indignation for the wrong will creep into the estimate and swell the damages beyond the strict legal limit.

Neither are the damages to be vindictive or exemplary, by way of punishment. The law has provided for that otherwise. Whenever death ensues from the misconduct or negligence of an officer of a steam vessel, he may be prosecuted and punished as for manslaughter. (R. S., sec. 5344.)

According to the standard life tables the expectancy of life of the deceased was about thirty-eight years. He had no trade or calling by which to earn anything, save that of a common laborer, and the decided weight of the evidence is that he was indolent or inefficient and inclined to intemperance. At both Roseburg and Salem the family were glad to accept charity from comparative strangers, although the deceased was one of them and in apparent good health.

Earning as he might, if he would, three hundred or four

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hundred dollars a year, it is not probable that he could furnish his mother more than one hundred dollars a year of it. Her age is not shown directly, but it may be inferred from the circumstances that she is between forty and fifty years old. Her expectation of life is then about twenty years. The present value of one hundred dollars a year for twenty years is about the compensation she is theoretically entitled to for the pecuniary loss caused by the death of her son. The expectation of life in the case of the brothers and sisters is greater—indeed greater than that of the deceased; but the obligation to take care of them is less than in the case of the mother. Counting interest at the present legal rate, eight per centum, I think one thousand dollars is all that ought to be recovered.

But, as in my judgment, the grant of letters to Davis was valid until revoked and those to the libellant void, the latter can not maintain this suit as the representative of the deceased, and therefore the libel must be dismissed with costs.

IN RE RUDOLPH.

CIRCUIT-COURT, DISTRICT OF NEVADA.

MARCH 1, 1880.

1. **IMPORTS—CONSTITUTION.**—The word “imports,” as used in that clause of the constitution of the United States which says that “no state shall levy any imposts or duties on imports or exports,” does not apply to articles carried from one state into another, but only to articles imported from foreign countries.
2. **DRUMMER’S LICENSE.**—A state statute which imposes a license tax upon all traveling merchants, agents, etc., who travel in the state of Nevada and sell, or offer to sell, goods by sample or otherwise, to be delivered at a future time, without any discrimination against the goods or products of other states, does not violate the provisions of the constitution of the United States forbidding the levying of imposts, or duties on imports, or conferring upon congress the power to regulate commerce between the states, with respect to goods sold by such traveling agents or drummers, for their employers doing business in California, to be shipped at a future day to the purchaser.

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3. **SAME—HABEAS CORPUS.**—A party arrested for the offense of selling goods in Nevada for his employers in California, without a license, in violation of a statute which makes no discrimination against goods brought from another state, is not restrained of his liberty in violation of the constitution or laws of the United States.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

HABEAS CORPUS. The facts appear in the opinion of the court.

Lewis & Deal, for the petitioner.

M. A. Murphy, attorney-general, for the respondent.

By the Court, SAWYER, Circuit Judge. The petitioner is a citizen of California, and in the employment of Adelsdorfer & Co., merchants of San Francisco, California, engaged in the coffee and spice trade. He was traveling in Nevada, engaged in such employment, offering to sell and selling such goods, wares, and merchandise as his employers dealt in. Upon making sales, he transmitted the orders to said employers in San Francisco, who filled them and shipped the goods sold to the parties ordering them, at their respective places of business in Nevada. For selling goods in the course of said employment at Virginia City, Nevada, he was arrested and held in custody upon a warrant issued upon a charge of having committed the offense of pursuing such business without having procured a license as required by a statute of Nevada, passed February 20, 1877. (Stat. 1877, p. 79.) A writ of habeas corpus having been issued, and the body of the prisoner produced, he now asks to be discharged from custody on the ground that said act is void, as being in violation of subdivision 3, section 8, of article I of the constitution of the United States, conferring upon congress power to "regulate commerce among the several states;" also of section 10, subdivision 2 of the same article, prohibiting the states from laying imposts or duties on imports. The statute of Nevada in question provides "that every traveling merchant, agent, drummer, or

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other person selling, or offering to sell, any goods, wares, or merchandise of any kind, to be delivered at some future time, or carrying samples and selling, or offering to sell goods, wares, or merchandise of any kind similar to such samples, to be delivered at some future time," shall obtain a license, and pay for such license twenty-five dollars per month. It further provides that any person without a license, "so offering any goods, wares, or merchandise for sale, shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than fifty dollars nor more than five hundred dollars."

It is settled in the case of *Woodruff v. Parham*, 8 Wall. 123, that the word imports, as used in subdivision 2, section 10 of article I of the constitution, does not apply to goods brought from one state into another, but is limited to goods brought into the United States from some foreign country. The statute of Nevada, therefore, does not violate that provision of the constitution. We think, also, that the same case, and the following case in the same volume (*Hinson v. Lott*, p. 148), determine the other question raised, and that the statute of Nevada in question does not violate the constitutional provision conferring upon congress the power to regulate commerce among the states. Conceding, for the purposes of the decision, the license fee to be a tax upon the goods sold, there is no discrimination against the goods of other states in favor of the products of Nevada; but all are taxed alike, and under these authorities, where there is no discrimination, the imposition of the tax is a legitimate exercise of the taxing power by the state.

In *Woodruff v. Parham*, 8 Wall. 140, the court says: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states, or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citi-

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zens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void."

And in *Hinson v. Lott*, 8 Wall. 152, the court says: "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other states in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation, and be forbidden by the clause of the constitution just mentioned. But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same act of fifty cents per gallon on all whisky and all brandy from fruits manufactured in the state. In order to collect this tax every distiller is compelled to take out a license, and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come, in the light of these earlier sections of the act, to examine the thirteenth, fourteen, and fifteenth sections, it is found that no greater tax is laid on liquors brought into the state than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the state, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the state. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

In all the cases cited on behalf of the petitioner, from *Brown v. Maryland* down, there was discrimination, and the discrimination was referred to as the obnoxious feature

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of the statutes in question in the various cases. This is the distinction taken between that class of cases and those cited in this opinion, expressly taken in *Wellon v. State of Missouri*, 91 U. S. R. 282, and again recognized in *Cook v. Pennsylvania*, 97 Id. 573, as well as in other cases. The statute of Nevada makes no reference whatever to foreign goods, or goods brought from or the products of other states. It simply imposes a license tax upon the occupation of all traveling merchants, agents, drummers, or other persons selling or offering to sell goods of any description, without reference to when or where they are made. The act we think valid, and that the petitioner is not restrained of his liberty in violation of the constitution or laws of the United States. It is therefore ordered that the petitioner be remanded to the custody of the proper officer, and the writ be discharged.

NORTH NOONDAY MINING COMPANY v. ORIENT
MINING COMPANY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 4, 1880.

1. ONLY CITIZENS CAN LOCATE MINING CLAIMS.—Under the act of Congress of May 10, 1872, relating to the public mineral lands, none but citizens of the United States, and those who have declared their intention to become such, can acquire any right to such lands by location.
2. HOW NATURALIZED, AND MODE OF PROOF.—A foreign-born son of an alien may become a citizen by being naturalized, or by the naturalization of his father, during his minority; but, whether he or his father was so naturalized or not, is a question of fact for the jury; and, as tending to prove that fact, the affidavit of the party himself is, under the statute, competent evidence, for all purposes of said act of May 10, 1872.
3. POWER OF MINERS TO LIMIT WIDTH OF LODE CLAIMS.—By implication, the act of May 10, 1872, confers upon the miners the right to limit the width of a lode claim to twenty five feet on each side of the middle of the vein.
4. MINERS' RULES MUST BE IN FORCE.—But to be of any validity, a rule or custom of miners must not only be established or enacted, but must be *in force* at the time and place of the location. It does not, like a statute, acquire validity by the mere enactment, but from customary obedience and acquiescence of the miners. It is void whenever it falls into disuse, or is generally disregarded.

Points decided.

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5. **QUESTION OF FACT.**—It is a question of fact for the jury whether or not a mining law or custom is in force; but when shown to have been in force, the presumption is that it continues in force until the contrary is proved; and parol evidence is admissible to show whether the rule or custom is in force or not.
6. **DEFINITION OF VEIN OR LODE.**—A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin or many feet thick, or irregular in thickness; and it may be rich or poor, at the point of discovery, provided it contains any of the metals named in the statute.
7. **DISCOVERY OF A VEIN.**—No rights can be acquired, under the statute, by location, before the discovery of a vein or lode within the limits of the claim located.
8. **DISCOVERY OF VEIN AFTER LOCATION.**—But a location is made valid by the discovery of a vein or lode at any time after the location, provided that such discovery is made before any rights are acquired in the same claim by other persons.
9. **OTHER VEINS THAN THOSE DISCOVERED.**—Where a valid location is made upon a vein or lode discovered, the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim extended vertically downwards, to which no right had attached in favor of other parties at the time the location became valid, although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical side lines.
10. **HOW LOCATION TO BE MARKED.**—A location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced, but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds, and written notices, whereby the boundaries can be readily traced, is sufficient. If the center line of a location of a lode claim, lengthwise, be marked by a prominent stake or monument at each end thereof, upon one of which is placed a written notice showing that the locator claims the length of said line upon the lode, from stake to stake, and a specified number of feet in width on each side of said line, such location is so marked that the boundaries may be readily traced; and so far as the marking of the location is concerned, is a sufficient compliance with the law.
11. **RIGHT OF SUBSEQUENT LOCATOR TO OBJECT.**—A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location, or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim.
12. **AS TO RECORD OF A MINING CLAIM.**—Where a rule or custom of miners, in force, requires a location to be recorded, such recording is necessary, otherwise not. To make a valid record, it must contain the names of the locators, the date of the location, and such a description of the

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claim by reference to some natural or permanent monument, as will identify the claim; but such natural objects or permanent monuments are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If, by reference to any such natural object or permanent monument, the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular, otherwise not.

13. **WORK NECESSARY TO HOLD A CLAIM.**—The statute requires one hundred dollars worth of work on each claim located after May 10, 1872, in each year, and in default thereof, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, and before any relocation is made, he thereby preserves his right to the claim; and no other person has any right to relocate it after such resumption of work, in good faith, by the first locator, even though the latter had failed to perform any work for the period of one year, or more, immediately before he resumed work.
14. **AS TO LOCATION AND SALE BY AN ALIEN.**—If, in the attempt by an alien to locate a claim, he performs all the acts necessary to a valid location by a citizen, and then conveys such claim to a citizen, who takes possession, and continues to perform all the conditions required by law to hold such claim, such citizen thereby acquires and holds a valid title to the claim so located by the alien, as against all persons having acquired no right therein before such conveyance by the alien.
15. **JOINT LOCATIONS BY CITIZENS AND ALIENS.**—If a citizen and an alien jointly locate a claim not exceeding the amount of ground allowed by law to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen gives a valid title.
16. **CORPORATION, WHEN DEEMED A CITIZEN.**—A corporation organized and existing under the laws of California is to be deemed a citizen in the sense of the act of congress of May 10, 1872.
17. **WHAT IS ACTUAL POSSESSION.**—A person who has purchased a mining claim which had been properly located and marked out on the ground, and who is personally, or by agents, upon the claim, working and developing it, and keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim, by virtue of mining laws, but is in the actual possession of the whole claim. Such possession is a *possessio pedis*, extending to the boundary lines of the claim.

THIS was an action in the nature of an action of trespass upon a lode mining claim, in the Bodie mining district, California, in which the defendant pleaded title to the *locus in quo*. The case was removed from the state court to the circuit court of the United States, where it was tried by a jury. The facts are sufficiently referred to by the court to illustrate the points of the charge.

Stewart, Van Clief & Herrin, for the plaintiff.

R. M. Clark and George B. Merrill, for the defendants.

Charge to the jury,* SAWYER, Circuit Judge:

Gentlemen of the jury: I congratulate you that we are approaching the conclusion of this trial. It has run through many days, even weeks, but it has not been without interest. The questions that have been presented are many, and some of them difficult; but the case has been thoroughly prepared. It has been zealously, exhaustively, and ably tried and argued on both sides; whatever great ability, great zeal, thorough preparation, and a thorough knowledge of the subject is able to contribute, has been contributed to explain and illustrate this case. Science has also been called into exercise. You have had a glass model here which shows you the internal condition of these mines. You have had another model, which exhibits to your view the shafts, drifts, cross-cuts, veins and their connections, in their proper location, and illustrates to you all the workings of the mines. You have had diagrams also exhibiting the same workings in that form, and everything, indeed, which could be desired to throw light on the subject has been prepared and arranged and presented for your consideration and the consideration of the court.

* The charges to the jury in this case, and in the case of *The Jupiter Mining Company v. The Bodie Consolidated Mining Company*, *post*, cover nearly all the points likely to arise in the trial of the right to a mining claim, the title to which depends upon the provisions of chapter VI, Title XXXIII of the R. S. of the United States, and many of the points are believed to be new. The cases were elaborately and ably tried by some of the ablest and most experienced mining lawyers in the land; and every point was thoroughly argued and reargued by counsel, and fully considered by the court. The charges were written out by the judge before delivery, and the points in this case fully reargued by counsel, and reconsidered by the court on motion for new trial. (See opinion on motion for new trial, *post*.) Applications for copies of these charges have been received from nearly every mining state and territory. The ability with which the law points were argued, the careful consideration given to them by the court, both upon the trial and motion for new trial, the number and importance of the points passed upon, and the general interest manifested in the cases throughout the mining regions, render it certain that they are sufficiently important to justify reporting.—REPORTER.

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Counsel having ably discharged their duty, it now devolves on the court to state to you the law governing this case; and then it will be your duty, gentlemen, and your province, to determine the facts. The questions of fact are for you to determine; the weight to be given to the evidence, the credit to be given to the witnesses, and everything relating to a disputed question of fact, is for your sole consideration and determination.

If I state the testimony, I shall only do it for the purpose of calling your attention to it and stating its tendency; but I shall not go over it fully. If I intimate an opinion on a question of fact, you are not to be governed by it, unless it corresponds with your own ideas as to what the facts are. If I make a mistake in stating the testimony, or alluding to a fact, you will correct it by your own recollection and judgment. I do not intend to express an opinion on the questions of fact, where the testimony is in conflict. I shall state to you the law which governs this case, and it is your duty to take the law from the court.

There are questions here that are new, and have never been determined before, so far as I am aware. Some of them, as I stated before, are difficult; some, I may not be entirely clear about; but I have reached certain conclusions on the questions of law that have been so ably argued, and those I shall state to you so far as I deem them applicable to the case, and you will take them from the court and be governed accordingly. Whether right or wrong, it is your duty to act on them as given by the court. If the court makes a mistake, or an error of law, it is known where that error lies. It can be re-examined by the court on a motion for a new trial; or it can be taken to a higher tribunal, where the error will be corrected. But if you disregard the law as given to you by the court, and commit an error, it can not be known on what error you acted. Therefore, there are no means of correcting your errors of law; but errors of fact may perhaps be corrected by means of a new trial. You will, therefore, regard strictly the law as given you by the court, but you yourselves will determine the facts of the case.

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Counsel on one side have presented a large number of instructions, and on the other side a less number. I have forty odd pages of instructions asked by one side. I shall not attempt to read these instructions. They are generally disconnected, and, even if correct, would serve rather to confuse than to illustrate. All, however, could not be given. I will state to counsel here, that I shall only give such of their instructions as are covered by the general charge, and in my own language, as it will be delivered to the jury. In other respects, except as given in my own language, their instructions will be refused.

By an act of congress, which took effect May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as applicable and not inconsistent with the laws of the United States.

In order to acquire any right of location and purchase under this act, a party seeking to acquire such right must either be a citizen of the United States, or must have declared his intention to become such. If, therefore, Smith, or any other locator under whom plaintiff claims, was not a citizen, or had not declared his intention to become such at the time of making his location, he acquired no right under the act by virtue of such location. And whether Smith, or any other of such locators, was at the time of his location, a citizen, or had declared his intention to become such, is a question of fact for you to determine from the evidence. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, and none others, are citizens of the United States. A person born in a foreign country, out of the jurisdiction of the United States, whose father is not a citizen of the United States, can only become a citizen by naturalization. The foreign-born son becomes a citizen by being himself naturalized, or by the naturalization of his father during the minority

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of the son. If, therefore, Smith was alien born, it was necessary that he should be naturalized, or that his father should be naturalized, during his minority, in order to make him a citizen. The statute, for the purpose of acquiring a mining location, makes the affidavit of the party himself competent evidence of his naturalization. It is for you to determine the sufficiency of the evidence to establish the fact.

All the locations under which plaintiff claims were made since May 10, 1872; and at the time they were respectively made, the statute authorized a claim to be one thousand five hundred feet in length along the vein or lode, and it was provided that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom in force at the time of the location, at the place where it is made, the location may extend to the distance of three hundred feet on each side of the middle of the vein at the surface: that is to say, the claim may be one thousand five hundred feet in length along the vein, by six hundred feet wide, including three hundred feet on each side of the middle of the vein. As I construe the statute, however, and so instruct you, by implication, the miners by a rule, regulation, or custom, established and in force at the time and place of the location, may limit the width of the claim to twenty-five feet on each side of the middle of the vein at the surface. But such limitation to twenty-five feet on each side, to be valid, must be by virtue of a rule, regulation, or custom, which has not only been established, but which is actually in force at the time of the location. The regulation must be in accordance, and not in conflict with, the laws of the United States and of the state of California; and the laws of California provide that "in actions respecting mining claims, proof must be admitted of the customs, usages, or regulations, established and in force at the bar or diggings embracing such claim; and such cus-

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toms, usages, or regulations, when not in conflict with the laws of this state, must govern the decision of the action." This provision is still in force, except so far as its operation is limited by the act of congress.

One of the locations under which plaintiff claims was made November 10, 1875, and the claim was relocated December 15, 1876, each time three hundred feet wide on each side of the lode; the notice in terms purporting to locate it under the act of congress allowing such location.

It is claimed by the defendant that there was, at the time of the location and relocation, a regulation in force in that district, limiting the claim to fifty feet on each side of the vein, and that the location of three hundred feet is, therefore, void. Now, whether there was or not such a regulation or custom in force at the time, is a question of fact to be found by the jury from all of the evidence in the case on that point. The defendant, to show a regulation limiting the location to fifty feet on each side, introduced the minutes of proceeding of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation, and minutes of meetings held at various times subsequently, amending the rules, but continuing this rule in force down to and including November 13, 1867, at which time the last action in respect to modifying the rules and regulations was had till December 30, 1876, which is after said location and relocation, and nine years after any meeting amending said rules. At said meeting of December 30, 1876, the miners declined to adopt "the United States mining laws;" and no action upon the subject of rules is shown to have been since had by any miners' meeting.

The plaintiff, to meet this testimony, introduced the mining records of the district, from which it appears that from and including the year 1872, when the act of congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district, there being none in 1872, one in 1873, in which no width was specified, and none in the year 1874; that during the year 1875, eleven quartz locations were made, of which nine were made three hundred feet wide on each side of the lode, and pur-

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ported to have been made in pursuance of said act of congress, and two only of fifty feet wide on each side, one of which two was marked on the record as abandoned; and during the year 1876, twenty-five locations appear to have been made, of which five were three hundred feet wide on each side of the vein; one an extension of a six-hundred-foot claim having no width mentioned, and the others fifty feet wide on each side, four of which being after the relocation by Lockberg. From this it is argued by plaintiff, that quartz mining in the district was practically abandoned for several years, and no laws on the subject were practically in force; that on the return of the miners and the revival of mining in 1875, the act of congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims three hundred feet wide on each side, and in practice adopted and generally acquiesced in that rule—the rule limiting the claims to fifty feet, by common consent, falling into disuse and ceasing to be in force. As held by the supreme court of California, in commenting upon the provision of the state statute cited, “no distinction is made by the state statute between a ‘custom’ or ‘usage,’ the proof of which must rest in parol, and a ‘regulation’ which may be adopted by a miners’ meeting and embodied in a written local law. The law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse, or is generally disregarded. It must not only be established, but in force. A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time.” (*Harvey v. Ryan*, 42 Cal. 628.)

It is for you, then, gentlemen of the jury, to determine whether this limitation to fifty feet was actually in force at the time the two locations three hundred feet wide on each side were made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable

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period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time, and, being once in force, a presumption would arise that it continued in force till something appears showing that it had been repealed, or had fallen into disuse and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. Now, gentlemen, whether in view of there being few locations in this district during several years, and none in some, and of the passage of the act of congress referred to, and the location, at first, after the revival of the mining interest in 1875, of almost all claims, in pursuance of the provisions of the act, three hundred feet wide on each side, if such be the fact, and in view of all the circumstances appearing in the evidence, it is for you to determine whether the fifty-foot limitation had fallen into disuse, or was really in force at the date of the two locations in question. If it was not in force, then, in that particular, if otherwise valid, the location was good and valid to the full extent of three hundred feet on each side of the vein. If the limitation was in force, then it was void as to the excess over fifty feet on each side of the vein, but valid to the extent of fifty feet, and no more.

The statute also provides, gentlemen of the jury, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." So that no rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, and it may be many feet thick, or thin in places—almost or quite pinched out, in miner's phrase—and in other places widening out into extensive bodies of ore. So, also, in places, it may be quite or nearly barren, and, at other places, im-

mensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode after discovery and location sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the East Noonday North, for example, discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered, was, in this particular, valid, otherwise not. The same observation would be true as to each of the other claims held by plaintiff.

I instruct you, further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations, and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid. So, also, gentlemen of the jury, where a party has made a location of a mining claim upon a mineral vein or lode discovered by him, in all respects valid, he is entitled to "have the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and all of veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downwards vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of such surface location." That is to say, if the plaintiffs or

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their grantors discovered a mineral vein or lode in the North Noonday claim, and made and have now in all respects a valid location of that claim, then they are not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of their surface lines extended vertically downwards, to which no right had attached in favor of other parties at the time their location became valid, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of the surface location. If the plaintiff has a valid claim to six hundred feet wide, then its right extends to all such veins or lodes, under the conditions stated, within the surface lines bounding the six hundred feet drawn vertically downwards; and, if the vein in question is one of the veins having its top or apex within such surface lines drawn vertically downwards, its right extends to and includes that vein. If it has a valid claim to one hundred feet wide, and only so much, then to such veins or lodes within the one hundred feet lines.

The same principle and instruction applies to the Keystone and East Noonday North claims. If the plaintiff has a valid location to those claims, or either of them, then it is entitled to all the veins or lodes under similar circumstances, the apices or tops of which lie within the surface lines of such valid location, or locations, extended vertically downwards.

The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute, it is required that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced;" but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. If the center line of a location of a lode-claim lengthwise along the lode be

marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced; and, so far as the marking of the location is concerned, is a sufficient compliance with the law.

If, therefore, as the testimony tends to show, the locator of the North Noonday mining claim planted a prominent stake at a shaft sunk in the earth on a vein, lode, or ledge, upon the northern side of which was placed a notice, stating that he claimed one thousand five hundred feet on "this the Noonday Quartz Lode," including all the dips, spurs, angles, and feeders, together with three hundred feet on each side; that said claim begins at a point in the center of a small shaft about one fourth of a mile northerly from Queen Bee Hill, and extends thence in a northerly direction one thousand five hundred feet to a post and mound upon which is inscribed "Noonday Quartz Lode, Charles Smith's Northern Boundary," and erects such mound and stake at said northern boundary, and marks said inscription thereon, the location is distinctly marked on the ground, so that its boundaries can be readily traced within the meaning of the act, and is a compliance with the law in that particular. The same principle is equally applicable to the Keystone location, and to that of the East Noonday North. There is testimony tending to show that the rule and custom of miners in Bodie district, at the time the several locations under which plaintiff claims were made, required mining claims to be recorded. If you find such to have been the rule or custom in force at the time, then a record was necessary, otherwise not.

In order to make a valid record, it was necessary for it to contain the name, or names, of the locator or locators; the date of the location, and such a description of the claim, or claims, located, by reference to some natural or permanent monument, as would identify the claim. The natural objects or permanent monuments here referred to are not re-

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quired to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. The record of each location of the North Noonday, Keystone, and East Noonday North, introduced by plaintiff in evidence, contained the names of the locators, the date of their location, and a description of the claim located by reference both to a shaft and to stakes planted in the ground having notices of the location thereon. If you are satisfied from the evidence that these records were in fact made (and there is no evidence to the contrary), and that the description of the several claims located therein contained, by reference to the natural and permanent monuments mentioned, were such as would identify the claims with reasonable certainty, then you will find the records sufficient and valid in this particular, otherwise insufficient.

As there has been much comment upon the record of the East Noonday North location, I think it proper to call your attention more particularly to it. The record appears to be a copy of the notice placed on the claim, and would, doubtless, so be understood by a miner reading it for information. A person reading the record would be informed by it that the owners of the Noonday claim were the claimants, and that the claim was named the East Noonday North, probably with reference to the Noonday claim; that it was located on Silver Hill, a natural, well-known object; that the claim commenced at a stake with a notice on it, of which the record is a copy, placed east of the Noonday shaft, which is a permanent object, having, as the testimony tends to show, already existed eight or ten years, and extended in a northerly direction from the stake, one thousand five hundred feet by fifty feet on each side.

There was, then, in the record, a description of the location with reference to Silver Hill, a natural object, and the Noonday shaft, a permanent object, and it is for the jury to determine whether a miner seeking information from this record could go to the permanent object, the Noonday shaft on Silver Hill, and thence east and find the stake and notice

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pointing out the location on the ground with reasonable certainty. If so, the jury will be justified in finding that there is such a description of the claim in the record with reference to some natural or permanent object, as to identify it, and that the location is valid in this particular. It was not necessary for the claimants to finally mark the location on the ground till after the record was made, and the testimony tends to show that the location was not fully completed till the next day after the record was made, when the locators planted this stake with the notice on the south line of the claim, and of the North Noonday claim one hundred feet east of the Noonday shaft, with another at the northerly end, and that this became the final location on the ground, and which, the testimony tends to show, was ever after claimed and subsequently surveyed and stakes placed at the corners.

If the jury find that the location was at that time actually marked upon the ground by stakes and notices, so that its boundaries could be readily traced in the manner I before instructed you was sufficient with reference to the North Noonday claim, then the location was sufficient in this particular also.

The testimony also tends to show, that prior to any rights being acquired by the defendant, plaintiff's grantors, in addition to the lode-line stakes set up at the location of their several claims, planted other stakes and monuments at the various corners of their claims, thus forming a parallelogram one thousand five hundred feet long by three hundred feet wide, including the Keystone, East Noonday North, and a portion of the original North Noonday claims with a line of five stakes on each end of the parallelogram, and that they and the plaintiff renewed these stakes from time to time as they were removed until the work was commenced at the combination shaft, which has ever since been continuous to the present time; and it is claimed that if there was at the time of the location any defect in the marking on the ground, this additional marking before any rights were acquired by the defendant was clearly sufficient to validate these claims. In regard to this point, I instruct you,

gentlemen, that a subsequent locator can not object that a prior location of a mining claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim.

The testimony tends to show, and there is none to the contrary, that Smith did no work on the North Noonday within the year after he located it in 1875, and supposing he had forfeited his claim, he procured Lockberg to relocate it for him and convey it on December 16, 1876; that Lockberg did so relocate it on that day and immediately conveyed it to Smith, who then, either alone, or in connection with others interested with him, entered upon the claim and did sufficient work during the year to hold it for that year; and that Smith paid the recording fees, fifteen dollars.

If these be the facts, and no other rights had in the mean time attached—and there is no evidence that any had attached—then, if the location made by Lockberg was otherwise sufficient and legal, and Lockberg and Smith were American citizens, Smith, by the several proceedings, had acquired a valid right to the claim.

The statute requires one hundred dollars in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and in default of such work being done, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of relocators, he preserves his claim.

The statute nowhere authorizes a person to trespass upon, or to relocate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

It is urged by defendant that Smith was not a citizen, and, therefore, that he could acquire no right by location.

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In view of this claim, and in case you find from the evidence this to be the fact, I give you this further instruction: The testimony shows that Smith, at various times, before defendant acquired any interest, conveyed portions of whatever right he had to other parties next hereinafter named, and finally on September 28, 1878, conveyed all his remaining interest in all of the claims by specific description to said parties, Irwin, John, and James Welch and Patrick Clancy, in whom, whatever interest had before been acquired by virtue of said several locations, at this time had become vested.

If Smith, even though not a citizen, performed all the acts necessary to make a valid location, and did the work necessary to keep his claim good had he been a citizen until he conveyed to Irwin and others, and if Irwin and his co-grantees were citizens, and after the conveyance to them took possession and control, and kept up the monuments and markings, and performed the necessary conditions to keep the claims good, then they acquired a good and valid right to the claim as against defendant from the date of the conveyance to them, provided that no other rights had attached in defendant's favor prior to such conveyance to them, and such subsequent performance of said required conditions by them.

The East Noonday North claim was located by Welch, Smith, and Irwin November 27, 1877, before any rights had been acquired by the Orient Company, defendant. The claim contains no more than one man was authorized to locate. So that, if one or more of the locators were citizens, in that particular the location of the claim was good as to such citizen or citizens, even though one or more of the others were aliens and not entitled to locate. If, therefore, one or more of these locators were citizens, and the claim was in other particulars well located, and the proper conditions performed to hold the claim till the subsequent conveyance to plaintiff, November 20, 1878, a good title thereto as against defendant passed to the North Noonday Company, plaintiff, by that conveyance.

The North Noonday Mining Company, plaintiff, is a cor-

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poration, created and existing under the laws of California, and is, therefore, to be deemed a citizen within the meaning of the statute, and as such, is competent to purchase and hold a mining claim. Irwin, the Welches, and Clancy, as locators of the East Noonday North, and grantees of Smith of the other claims and of his interest in the East Noonday North, held all the interest in all said claims acquired by the various proceedings in question, and so holding such interest on November 20, 1878, conveyed all their interest in all said claims to the North Noonday Mining Company, plaintiff, which thereby became vested with all the interest that could be acquired by virtue of said transactions. If, therefore, the grantors of plaintiff had performed all the acts necessary for a citizen to perform in order to locate and hold said several claims down to the date of said conveyance, and the said plaintiff took possession and control of said several claims upon receiving said conveyance, and thereafter kept the said claims properly marked on the ground and performed all the conditions necessary to maintain their said claims, then said plaintiff acquired a good title to such of said claims as were so properly in form located and kept up as against said Orient Mining Company, defendant, provided said defendant acquired no rights in said claims, or any of them, prior to the acquisition of said interest by said plaintiff through said conveyance, and such subsequent acts of said plaintiff to preserve their rights to said claims, even though one or more of said original locators should be found not to have been citizens, and, on that ground, incompetent to acquire any title under said act of congress.

The testimony tends to show various work done on the several claims by the claimants Welch, Smith, and others during 1877 and 1878, claimed by plaintiff to be sufficient to hold the claims; that Welch in August, 1878, placed a line of mounds and stakes on each end of the several claims fifty feet apart for a distance of some three hundred feet by way of indicating the corners and end lines; that Anderson, on October 19, 1878, measured off the claims and again set stakes, according to the proper measurements; that these

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stakes being four inches square, three and one half feet high, painted white, and marked so as to indicate the corners and lode lines of the said claims, were found there by Scowden when he finally surveyed the claims in the following spring and located the shaft.

The testimony further tends to show, and, as to this part of the testimony, I believe there is none to the contrary—if there is any you will remember it—that the interest in all the three claims having been concentrated in the plaintiff, the North Noonday Mining Company, in the preceding November, the plaintiff in March, 1879, before any other parties had entered upon these claims or made any claim thereto, located and made arrangements to sink a three-compartment shaft, known as the combination shaft, for the benefit, and to be used for the development of all the claims, and also the Noonday claim to the south; that machinery and supplies were at once collected and brought upon the ground for the purpose of sinking said shaft and developing and jointly working all said claims; that from that time on the plaintiff by its agents and servants was actually on the ground erecting machinery and buildings, exercising acts of ownership and dominion over the claims, claiming title to the whole; that the plaintiff commenced sinking the combination shaft on or about April 5, 1879, and from that time to the present has been, by its agents and servants, actually on the ground, constantly and vigorously prosecuting the work of developing and working the mines claimed by them, and constantly exercising dominion over them; that by June 1 buildings and machinery had been erected and brought upon the ground and supplies collected to the amount of more than thirty thousand dollars.

If you find these to be the facts, gentlemen of the jury, then there was not at this time merely a constructive possession of these mining claims by virtue of the mining laws alone, but an actual occupation and possession, a *possessio pedis*, a physical presence of the plaintiff by its officers, agents, and servants, actually controlling and dominating the claims as early, at least, as the month of March or April, and the domination and possession extended to the bounds

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of the claims as described in the conveyance to plaintiff, under which it claimed title, and as indicated by the stakes planted by Anderson and found by Scowden to mark the location, and the notices stating the extent of the claims—the claims lying, the testimony tends to show, in one body and conveyed by one deed to the same party, and being developed by the same means as a part of one general system. If, therefore, you find from the evidence that the plaintiff acquired and maintained a valid location to all or any of these claims in question by the means in these instructions before indicated, and performed the acts of possession just supposed, before any right had accrued to defendant, then, as to such claim or claims, the plaintiff had as against the defendant both a good title and rightful possession at the time the trespasses are alleged to have been committed, and when it is conceded that the defendant actually entered and committed the acts complained of, and you will find for the plaintiff on those points.

If you find title and rightful possession in the plaintiff as just indicated, as to all or any of said mining claims, you will then inquire, whether the vein or lode in question which the defendant cut in the head of the winze at the end of its cross-cut, called by defendant Orient Lode No. 3, is one of the veins or lodes discovered in any of the claims, the right, title, and possession to which you find to be in the plaintiff as against defendant, and if you find that it is one of such veins or lodes, or if you find that it is not one of those lodes, but that it has its apex or top within the side lines of any such claim, the title and possession to which you so find to be in the plaintiff, drawn vertically downwards, then, in either case, it belongs to the plaintiff, and your verdict will be for the plaintiff. But if you find that said vein or lode so cut by defendant is not one of the veins or lodes discovered within any claim the title to which you find in the plaintiff, and that its apex or top is not within the side lines of any such claim of plaintiff drawn vertically downwards, but is a separate, independent vein, every part of which lies to the eastward, or outside of and beyond any claim, the title to which you find to be in plaintiff,

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Points decided.

iff, and no part of the apex or top of which is within the side lines of such claim drawn vertically downwards, then it does not belong to plaintiff, and your verdict will be for defendant.

If you find for the plaintiff, gentlemen, you will then inquire what the damages are. The testimony on the question of damages is, that about fifty-five tons of ore has been taken out, and I think the testimony is that it is about twenty-five dollars or thirty dollars per ton in value. The damages will be the value of the quartz removed; at all events, if you can not agree on the damages, they are entitled to nominal damages, say one dollar.

If you find for the plaintiff, your verdict will be: "We, the jury, find for the plaintiff, and assess the damages at so many dollars."

If, on the other hand, you find for the defendant, your verdict will be: "We, the jury, find for the defendant."

The verdict of the jury was for the plaintiff, with one dollar damages.

M. HARRIS ET AL. v. JAMES D. MILLER ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 8, 1880.

1. **DAMAGES FOR BREACH OF CONTRACT.**—A sum stipulated to be paid as liquidated damages for the breach of a contract, when there is no certain pecuniary standard whereby to measure the damages resulting from such breach, may be recovered upon proof of the stipulation and breach.
2. **SAME.**—But if the damages for the breach are certain, or can be reasonably ascertained by a jury, the damages agreed upon will be considered only as a penalty to cover the actual damage.
3. **CONSTRUCTION OF A CONTRACT.**—H. and L. agreed to pay M. and C. one thousand eight hundred dollars for five years for certain rooms in a building to be erected by the latter, and also to make, execute, and deliver to them a good and sufficient bond "to their satisfaction," in the sum of two thousand dollars, conditioned for the payment of such rent: *Held*, 1. That M. and C. had a right to require a bond which was sufficient to secure the payment of the rent beyond a reasonable doubt; 2. That if M. and C., acting in good faith upon the best information conveniently within their reach, rejected a bond tendered by H. and L.

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as insufficient, the latter are bound by their action; and, 3. That the circumstances considered, the contract should be construed as requiring a bond executed by other persons than H. and L.

Before DEADY, District Judge.

Addison C. Gibbs and Edward Bingham, for the plaintiffs.

W. Carey Johnson and I. A. Macrum, for the defendants.

DEADY, J. The plaintiffs, M. Harris and M. Lichenstein, bring this action to recover the sum of two thousand dollars, as liquidated damages for the alleged violation of an agreement by the defendants, James D. Miller and Charles P. Church, to construct a brick building on the south-east corner of First and Morrison streets, in this city, and to lease to the plaintiffs certain rooms therein for the term of five years from and after July 1, 1878. The cause was heard by the court without a jury upon the issues of fact, and at the same time upon a demurrer to the replication. From the evidence it appears that on December 8, 1878, the plaintiffs and defendants entered into a written agreement whereby the latter agreed to erect a brick building upon a lot on the south-east corner of First and Morrison streets, in this city, and to lease to the former certain rooms therein for the term of five years from and after July 1, 1878, for the monthly rent of one hundred and fifty dollars, payable in advance; in consideration whereof the defendants agreed to so pay said rent, and "to make, execute, and deliver" to the defendants on or before February 1, 1878, and to their satisfaction, "a good and sufficient and approved bond in the sum of two thousand dollars, conditioned to become void on the payment of said rent;" and to become forfeited as "the agreed and fixed amount of damages" to be recovered by the defendants for a default of thirty days in the payment of said rent; and a failure on the part of the plaintiffs to so furnish such bond was to render the agreement void. It is also provided in said agreement that any failure upon the part of the defendants to perform the same shall entitle the plaintiffs to recover the sum of two thousand dollars for such failure, as "stipulated and liquidated damages."

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The defense to the action as contained in the answer is, that the sum mentioned in the agreement as liquidated damages for the violation thereof, was only intended as a penalty; that the defendants erected the building as per said agreement, but that the plaintiffs did not on or before February 1, 1878, nor since, deliver to the defendants a good and sufficient bond, as by said agreement they undertook and promised.

The replication alleges that before February 1, 1878, the defendants had so changed the plan of said building as to put it out of their power to comply with their agreement, and thereby excused the plaintiffs from tendering the bond for payment of the rent.

The argument in support of the replication is, that if the defendants, on February 1, 1878, by reason of their own act, were unable to perform their contract, the plaintiffs may recover the stipulated damages for non-performance, without having complied with the condition precedent on their part, to wit, the delivery of the bond for the payment of the rent. As authority for the proposition, counsel cite *Patridge v. Gildermiester*, 40 N. Y. 96, and *Hawley v. Keeler*, 53 Id. 120. The first case is one where a party to a contract having failed to perform a condition precedent, the other was allowed to recover for part performance, and is therefore not in point. In the second case, the court does say that "the party who disables himself from performing his contract before default by the other party waives the performance of acts by the latter, which, except for such disability, he would be bound to perform as conditions precedent to a recovery on the contract." But the court held that the contract to give security for the payment of a quantity of cheese was not a condition precedent to the delivery thereof, but only concurrent with such delivery, and that therefore when the owner of the cheese had otherwise disposed of the same before the time for delivery, the other party was excused from providing or tendering the security, and might maintain an action for the non-delivery.

But the giving of the bond for the payment of the rent was a condition precedent in this case, and a very material

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one; for upon the faith of it the defendants were not only to furnish the rooms for five years, but in a large part to incur the expense of constructing a comparatively costly building.

However this may be, this demurrer must be sustained because a mere change of plan before February 1, 1878, did not in the least degree affect the ability of the defendants to construct the building so as to furnish the plaintiffs with the rooms therein according to the contract. The plan of the building might be changed every day. The defendants were under no obligation to build according to any plan until the bond was furnished for the rent, and when that was done, they could build according to the agreement, notwithstanding any changes of plan that may have been made in the mean time.

Considering the case, then, with this demurrer sustained, from the evidence the further facts appear to be, that early in January, the plaintiffs delivered to the defendants a bond in the sum of two thousand dollars, in due form of law, conditioned for the payment of the rent, as provided in the agreement, executed by themselves and William Harris and Isaac Friedman, of San Francisco, on December 26, 1879. Soon after it was received, the defendants sent the names of the sureties to Dun & Co.'s commercial agency in San Francisco, to ascertain their financial condition and standing, and towards the last of January received an answer to the effect that they were not at all equal to any such undertaking, and that what real property they had was covered with homesteads; and there is no evidence in the case tending to show the fact to be otherwise. On January 30, defendants returned the bond to the plaintiffs, saying: "Neither of the parties referred to seem to be men of any financial standing beyond the value of homestead exemption, and we therefore refuse the bond offered by you, not being satisfied with the guarantors thereon. We require men of undoubted standing as bondsmen, particularly as the amount of the bond is much less than the aggregate liability for rental."

The work upon the building was not commenced until in

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March; and so far as the rooms which the plaintiffs were to have are concerned, the building was constructed substantially as was contemplated at the time of the agreement, except that the width of the principal room on the lower floor was one foot in twenty-nine less, and that an elevated platform and a small circular stairway, convenient for the uses of the plaintiffs, were not put in said room, but can be at any time, at a comparatively small cost.

After refusing the bond offered by the plaintiffs, the defendants were still willing, and offered to allow the plaintiffs to give a satisfactory bond; but the plaintiffs did nothing further in the matter, except to claim that the one given was sufficient; when, about the last of February, the defendants told the plaintiffs that the contract was at an end, and they could not have the rooms. The building was finished in July, when the portion which the plaintiffs were to have was leased to a third person for something less than they were to pay for it. Upon these facts the first point made by counsel for defendants is that the sum named in the agreement as liquidated damages, to be paid by them for a failure to furnish and lease the rooms, is, notwithstanding such designation, only a penalty, and therefore can only be recovered so far as the proof shows the plaintiffs to have been injured by such failure.

Upon this subject the law is peculiar, and, instead of giving effect to the contract of the parties according to their intentions, it assumes to control them according to its standard of justice.

And, 1. Whenever it is at all doubtful whether the sum mentioned was intended as stipulated damages or a penalty to cover actual damages, the law, which always favors the latter as against the former, declares that the sum was intended as a penalty; 2. When the contract is explicit that the sum named shall be considered as liquidated damages, the contract is to be enforced according to its terms, unless qualified by some other circumstance, as when one agrees to pay a larger sum upon the failure to pay a smaller one, or when the damages resulting from a failure to perform the contract are certain, or can be reasonably ascertained by a

jury. But wherever the contract is for the doing or not doing a particular act or acts, and there is no certain pecuniary standard by which to measure the damages resulting from a breach thereof, an agreement to pay a stipulated sum as damages for such breach, will be enforced literally. (1 Am. Dec. 335; Sedg. on Dam. 399.)

This case falls exactly within the last category. The contract provides, that for a failure to furnish the rooms and lease the defendants shall pay two thousand dollars as liquidated damages. The rooms were wanted for the clothing business in the business part of the city, for a term of five years. It would be impossible to say what damage the plaintiffs might suffer from a breach of this contract, without at least waiting until the end of the five years, and that would be equivalent to a denial of any. The damage might have been merely nominal or it might have been very large, depending upon circumstances uncertain and contingent in their character. Situated thus, the parties having taken the precaution to agree upon the amount of damages to be recovered for a violation of their contract in this particular, the law, it seems to me, would hinder rather than promote the administration of justice by refusing to enforce it accordingly.

But counsel for defendants insist that there never was any breach of this contract by the defendants, because they were not bound to do anything under it, until the plaintiffs had furnished a satisfactory bond for the rent, which was not done.

It is admitted that the defendants could not arbitrarily and without some substantial reason refuse to receive a bond tendered them under this agreement. But the bond was to be to their "satisfaction;" and if in the exercise of their judgments, acting upon the best information conveniently within their reach, they in good faith concluded that the bond was not sufficient, why, then, the plaintiffs were bound by their action. And there is no presumption against the integrity of the defendants' conduct in the premises, but the contrary. If the plaintiffs claim that the refusal to accept the bond was unjustifiable, they must show it.

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The defendants had a right to a bond to their satisfaction, not only because that was the express agreement, but for the reason that in the very nature of the case it was right and just that they should. They were about to erect a costly building—possibly with borrowed money—relying upon this bond as a good security to them for one thousand eight hundred dollars a year towards the accomplishment of this enterprise for the next five years. Under such circumstances I think the law would say, in the absence of any agreement to the contrary, that the security should be good beyond a reasonable doubt.

The plaintiffs have offered no evidence as to the responsibility of the sureties in this bond. But upon it is the justification of each of them to the effect that he is worth two thousand dollars over all debts and liabilities and property exempt from execution. On the other hand, defendants have introduced evidence which shows that for the year 1877-78 the real property of Harris was only valued for taxation at one thousand eight hundred and thirty dollars, and that of Friedman's at two thousand four hundred and eighty dollars, upon the most if not all of which there are homesteads; that if they have any personal property, it is employed in some retail business in which they are engaged, and that they returned no such property for taxation during the year aforesaid. It being manifest that a bond with such sureties, living, too, in another state, would not be good, if any, security for the payment in Portland of one thousand eight hundred dollars a year for five years, counsel for the plaintiffs are driven to rest their case upon the proposition that by the terms of the agreement they were not bound to give a bond with any sureties, and that they complied with their contract when they tendered the defendants their own bond in the sum agreed upon, executed in due form of law.

It may be admitted that if the agreement was that the plaintiffs were only to give a bond executed by themselves, then the bond tendered was a "good and sufficient" one, because it was executed by them in due form of law in the sum and upon the conditions specified in the agreement.

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In *Aiken v. Sandford*, 5 Mass. 499; *Tinney v. Ashley*, 15 Pick. 552; *Van Eps v. The Corporation etc.*, 12 Johns. 342, and *Gazley v. Price*, 10 Johns. 268, it was held that a bond on condition that the obligor would make and deliver to the obligee a good and sufficient deed to a certain parcel of land was satisfied by the execution of a deed in due form of law to pass whatever title the obligor might have.

And it must be admitted that upon the mere letter of this agreement it may be said that nothing more is required than the bond of the plaintiffs. The language of the instrument is "that they (the plaintiffs) further agree to make, execute, and deliver to the said parties of the first part a good and sufficient and approved bond in the sum of two thousand dollars, conditioned," etc.

But the cases are not parallel. A covenant that A will make a good and sufficient deed to certain property is performed by the execution of a deed by him in due form of law. There are no sureties in a conveyance. But a bond on condition is more often made with sureties than otherwise, because it is usually intended as a guaranty for the performance of some act by the principal obligor; and therefore a covenant that A will give a bond to the satisfaction of B for the payment of money which A is already otherwise bound to pay, does not appear to be satisfied with the bond of A without sureties.

And it is very certain that it was not the understanding of the parties to the agreement, at the date of its execution and afterwards, that the bond of the plaintiffs was all that was required.

In the construction of this contract the court may consider the circumstances under which it was made and the situation of the subject of it and the parties thereto, and they all point to the conclusion that the parties contemplated that the plaintiffs were to give satisfactory security for the payment of the rent.

It is not pretended that the plaintiffs are persons of any considerable means or financial ability. They appear to have been engaged in this city in a small clothing business, in the old wooden house that was removed to make

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room for this building; and it is not likely that the defendants would incur the risk of erecting a costly building upon the faith of their unsecured promise to pay the rent for the principal portion of it for a period of five years. Besides, there was no necessity for the plaintiffs giving their bond merely for the payment of the rent; for they were already bound by the agreement to take the rooms and pay the rent, and, upon the acceptance of the lease, they would continue to be so bound by that instrument. Nor, under the circumstances, does the agreement of the plaintiffs, "to make, execute and deliver" a bond—not their bond—necessarily imply that such bond shall be executed by the plaintiffs alone, or even at all. The only possible reason for giving or taking a bond was, that the defendant might have security for the payment of the rent, which necessarily means something more than the promise of the plaintiffs to pay it; for that they already had.

My conclusion is, that the agreement should be construed as requiring the plaintiffs to furnish the defendants on or before February 1, 1878, a good and sufficient bond, executed by themselves and others, or by others alone, which would be recognized by the business community as at least reasonable security for the payment of one thousand eight hundred dollars a year for the period of five years.

In addition to these considerations, the evidence shows that the plaintiffs understood that the agreement required them to furnish a bond with sureties, and that they acted accordingly.

At the time of the execution of the agreement, the subject of sureties on the bond seems to have been spoken of, when Harris, who appears to reside in San Francisco, said he did not expect to give certain persons, naming some well-known capitalists there, but that he had friends worth twenty-five thousand dollars, who would go on the bond.

The bond tendered was executed with sureties, and when it was refused, on the ground of their insufficiency, no suggestion was made that the plaintiffs were not required to furnish a bond, with sureties.

Opinion of the Court—Hoffman, J.

[March,

On the whole, it is clear, that the plaintiffs having failed to perform the condition precedent, by tendering the defendants a bond within the time required that was a reasonable security for the payment of the rent, the contract for the lease was at an end, and the plaintiffs are not entitled to recover the damages stipulated for withholding the same.

There must be findings and judgment for the defendants accordingly.

THE BARK ANTIOCH.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MARCH 12, 1880.

SEAMAN'S WAGES—DISRATING COOK.—When a cook was put off duty in consequence of persistent negligence, disobedience, and insolence: *Held*, that he had no right to recover wages for the period during which he performed no duty.

Before HOFFMAN, District Judge.

D. T. Sullivan, proctor for libelant.

W. G. Holmes, proctor for claimant.

HOFFMAN, J. The libelant, who was cook on board the above vessel, was disrated by the master, and confined for a short period in irons for disobedience, neglect of duty, and insolence, culminating in an assault upon the master with a carving knife. The jury by whom he was tried, acquitted him of a criminal charge, based on this latter act. They probably took compassion on him on account of his age and infirmity. But their verdict can only be received as an expression of their conclusion that the charge was not proven beyond a reasonable doubt. It can not be treated in this civil proceeding as a judicial exoneration of the libelant from all blame; still less as precluding the master from submitting the facts to the court and demanding its judgment on a preponderance of proofs upon their true character and legal consequences. I do not consider it

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necessary to rehearse in detail the evidence. It is sufficient to say that, in my judgment, and on his own evidence, the libellant's conduct was utterly unjustifiable. Upon an assault on him by the master of a very trivial character, and which could have inspired no reasonable apprehension of serious bodily harm, he seized a knife and with violent language threatened to plunge it into his body, and this threat he declares on the stand he would have carried into execution. Nor was this grave offense an isolated ebullition of temper, or exhibition of an insubordinate spirit. His demeanor seems to have been habitually insolent, peevish, and refractory. He spoke of the master in the most insulting terms, and to him in a tone wholly inconsistent with their relations to each other.

But the more immediate cause for putting him off duty was his obstinate refusal to heed the master's repeated commands not to waste the ship's water. There may be some slight discrepancy as to the precise amount of water used by him. But it pretty plainly appears that nearly half of the whole supply had been used by the time the ship had performed one thousand miles of her voyage, and on the thirtieth day from her port of departure. The total length of the voyage (from Hongkong to this port) was six thousand four hundred miles, and its duration one hundred and two days. The master, alarmed for the safety of himself and crew, and exasperated at the libellant's persistent disregard of his orders on a matter of such vital importance, and also by his insolence and insubordination, carried to the extreme point of threats against his life, determined to put the man off duty, and in so doing I think him fully justified. Whether from natural defects of temper, or from age and disease, or from all these causes combined, the libellant was either unfit or unwilling to perform his duty. He was not disrated for a solitary act of insubordination and disobedience, but for persistent neglect to obey the master's orders on a point vitally affecting the safety of the whole ship's company. The cases, therefore, which declare the right of the seamen to be restored to duty on making unreasonable

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and tendering amends, have no application. The faults of the libelant were radical and incorrigible, and as they justified the master in putting him off duty, they also forbade his being restored to duty.

In the case of the *Ranger*, Bee, 150, it appeared that the mate had been guilty of insolence and insubordination towards the master, and by so doing had become liable to correction. The master struck him two blows, to which the mate offered no resistance. He subsequently sent him out of the ship. Upon these facts the court refused to decree a forfeiture of wages. But the judge observes: "If indeed resistance had been made, and this man's hand lifted against his captain, I should have decreed a forfeiture of wages without hesitation."

It would seem from the report of this case that the question was as to the forfeiture of wages antecedently earned, and it can not be doubted that, had the circumstances been similar to those of the case at bar, the learned judge would have decreed a forfeiture of all wages already earned. But no such claim is made by the master in the present case. The libelant's right to wages up to the time he was disrated is admitted, and the amount due him has been paid into court. The contest is as to his right to wages during the time when he did no duty, and his place was supplied by a substitute. I have already said that in my opinion the master was justified in putting the libelant off duty. If this be so, the man has clearly no right to compensation for services not performed, which he had shown his unfitness or unwillingness to perform, and which his own misbehavior justified the master in not further trusting him to perform. It is true that the man was subjected to punishment. He was kept in irons for a week or ten days, and was perhaps more or less confined to his room during the remainder of the voyage. But this latter confinement does not seem to have been close or rigorous, and it was not attended by any incident of harshness or oppression. The master had the right to inflict upon the libelant reasonable punishment. In view of the man's age and in-

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firmities, I think putting him in irons was injudicious, perhaps harsh. I can not say it was illegal. But even if it were, that circumstance could have no effect to confer upon the libellant a right to compensation for services not performed, if his previous misconduct justified the master in refusing to allow him to perform, or attempt to perform, them—in other words, in putting him off duty.

The numerous cases which deny to the master the right to deduct from the wages of a seaman the cost and charges of imprisonment in a foreign jail, by the master's procurement, and the wages accruing during such imprisonment, have no application to this case. Imprisonment, by the master's order, of a seaman in a foreign jail is allowable only in very rare and extreme cases. It is always strongly discountenanced by the courts. If resorted to, the master will not be allowed to inflict a double punishment on the seaman by making him pay the costs and charges, or by exacting a forfeiture of his wages. But confinement on board ship, when justifiable, stands on different grounds. When necessary for the safety of the ship, or to secure a criminal in order that he may be delivered up to justice, it can give no right to wages for services not rendered. When inflicted merely as a punishment it will in general debar the master from insisting on the further punishment of forfeiture. When occasioned and continued by the perverse refusal of the seaman to submit and return to duty, the statute itself deprives the latter of two days' wages for every day during which his refusal to do duty continues.

In a case mentioned by Judge Peters, in a note to *Thorne v. White*, 1 Pet. Adm. 173, that eminent judge refused wages to two seamen who were confined in irons "during the whole latter section of the return voyage," being of opinion that the confinement was justifiable and necessary for the safety of the ship. He allowed them, however, antecedently earned wages, but left them "to their remedy at common law by action for false imprisonment or any other mode of redress." Their wages were, in that case, withheld because their conduct had rendered it unsafe to permit them to earn them. They are denied in this case

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for an analogous reason. Experience had shown that the cook was unfit for his position. In neither case is the refusal to allow them a forfeiture or punishment. They are denied simply because, owing to the man's own fault, they were not earned.

Libel dismissed.

SAMUEL BROWN v. BENJAMIN F. LEETE.

CIRCUIT COURT, DISTRICT OF NEVADA.

MARCH 15, 1880.

1. ADVERSE POSSESSION—DIVISION LINE.—Where one claiming title by virtue of a deed, describing the land according to the United States survey, took possession, marked the dividing line, and occupied thereto exclusively, claiming title as to the true boundary: *Held*, that, although such line was not the true one called for in the deed, the possession was adverse, and, when continued long enough, a bar.
2. ACQUIESCENCE—DIVISION LINE.—Acquiescence in a dividing line for a period equal to that fixed by the statute of limitations for gaining title by adverse possession, binds the party acquiescing to that line.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

The facts are sufficiently stated in the opinion.

William Webster, for plaintiff.

Lewis & Deal, for defendant.

By the Court, HILLYER, J. This is an action of ejectment for the possession of a narrow strip of land in the south-west quarter of section 1, township 19. Both parties derive title from the United States, and the controversy has reference to the true lines dividing the quarter section into quarters, in one of its aspects, and in another to the character of the defendant's occupation of the premises in dispute. The defendant claims the disputed territory by virtue of his deed for the south-east quarter of said south-west quarter, and the plaintiff by virtue of his deeds for the other three quarters thereof.

The lines in dispute are the north and west lines of the

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defendant's south-east quarter. The strip of land in question contains about three acres. The testimony does not establish the position of the original and true boundary lines beyond doubt, but for the purpose of this decision we shall concede that those lines are as claimed by plaintiff, for the reason that we are convinced the defendant has a valid legal title to the land in controversy by operation of the statute of limitations.

Upon that point it appears in evidence that the defendant, Leete, went into possession of the aforesaid south-east quarter, set up monuments to mark the west and north lines, as he claimed them then to be, in the year 1871. In the year 1873, he set out along this line a hedge, intending and claiming and believing it to be on the true boundary line between his own and the plaintiff's land. In January or February, 1872, the defendant built a fence outside of and five feet from the proposed hedge to protect it. This was a substantial board fence, and has been there ever since. The defendant also set out six hundred and forty shade trees, and altogether had expended on the land in dispute about one thousand seven hundred dollars at the time this suit was begun. In 1871 one Osbiston, then superintendent of the Nevada Land and Mining Company, from which the plaintiff derails title, pointed out the south-east quarter, afterwards purchased by defendant, to him, and advised him to buy it. Defendant did so, and built his hedge and fence while Osbiston remained superintendent, and often passed by and saw the improvements being made by defendant without objection. All the superintendents who succeeded Osbiston were cognizant of the defendant's improvements. They lived near, at the mill of the company, were often seen by Leete, but never made any objection to his improvements. In Leete's deed the land was described according to the government subdivision, and he says that he claimed no other land; that he has never yet discovered that his hedge is not on the true line, and claims it to be so now. The land between the hedge and the fence he never did intend to claim, although since it was built he has exercised control of all within his inclosure. The defendant

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has been since February, 1872, in the open, peaceable, notorious, exclusive possession of all within the fence, and claiming title and exclusive ownership of all within his hedge. This action was begun in November, 1877, so that the period of five years during which defendant's occupation had continued had fully passed when the complaint was filed and the summons was issued.

The plaintiff endeavors to take this case out of the statute, upon the ground that Leete took possession under his deed describing this land as the south-east quarter of the south-west quarter, and, upon his own statement, did not intend to mark off or claim more land than his deed called for. A possession so taken, it is argued, can only be adverse up to the true boundary line, because, as to anything over that, the occupation is by mistake, and not under claim of right. This position will not bear examination, for every act of the defendant in entering and occupying this land was an assertion of title in himself. His actual substantial inclosure of it was, both by the statute of Nevada and the general principles of law, decisive proof of his adverse possession. (Comp. L. Nev., secs. 1024, 1026; Ang. on Lim., sec. 395; *Ellicott v. Pearl*, 10 Pet. 412-442.) The fence, together with the planting of the hedge and the shade trees, are acts evincing "an intention of asserting ownership and possession," and it is "the intention which guides the entry and fixes its character." (*Ewing v. Burnett*, 11 Pet. 41-53; *Bradstreet v. Huntington*, 5 Id. 410; *Ellicott v. Pearl*, *supra*.)

Had it appeared by any manifestations on defendant's part, at the time of his entry, that his claim of title was conditional upon the line marked by him being the true line, there would be some support for the plaintiff's position. But the evidence is clear that he marked out the boundary, not as a doubtful one, but as the true one, and all his actions agree with this view. He could not, then, have contemplated the discovery of an error and the future adjustment of the line to correct it. His expenditure of one thousand seven hundred dollars in improving this strip of land is very satisfactory evidence that the line he had marked was then

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believed by him to be the true one, and that he claimed title up to it. That there was in fact an error made by the defendant when he ran out the line may be true, but having been located as the true boundary, and possession taken, and title claimed to it for five years (the statutory period), that is certainly sufficient to give the possession an adverse character, and bar the plaintiff.

"It can not be disputed," says the supreme court of Pennsylvania, "that an occupation up to a fence for twenty-one years, each party claiming the land on his side as his, gives an incontestable right up the fence, and equally, whether the fence is precisely on the line or not. It is time that it should be settled beyond dispute that when a person is in possession by a fence as his line, or by a house or stable, for more than twenty-one years, his possession establishes his right. A possession claiming as his own is in law and reason adverse to all the world, and as much so if he had never heard of an adverse claim as if he had always known of it." (*Brown v. McKinney*, 9 Watts, 565.) Occupation up to a recognized line for fifteen years would establish it as the division line. (*Clark v. Tubor*, 28 Vt. 222; Ang. on Lim., sec. 393.)

In many cases where title is gained by adverse possession, the entry is founded upon some mistake of fact. Very rarely will it be found that one man has entered on the possession of another knowingly, willfully intending to usurp the possession and acquire title by lapse of time. One who enters under a void deed and occupies the land, claiming title against the world, possesses adversely, and if he continues in possession the required time will acquire title; yet his whole possession is founded on mistake as to the validity of his deed. If, in such a case, a mistake as to the whole title does not impair the quality of the possession, how can it be said to do so in this case, in which the mistake has been about a small part of the title only? It is true the defendant claimed under his deed, but he also claimed that under that deed he was entitled to hold up to the hedge. His possession was continued for the required time, under a claim of title in fee. He did not take pos-

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session admitting the possibility of some mistake, and saying, I only claim to the true line, and if this hedge is not on the true line, I do not claim to it; but he openly claimed the hedge to be the true boundary, and always claimed title up to it as such, exclusive of plaintiff and all others.

The cases relied upon by plaintiff to sustain his position, that if the defendant intended to set his fence on the true line, and it is not so, his possession has not been adverse, all, upon examination, come short of doing it. Expressions can be found in some of the opinions, which, when separated from the context and the facts, give some countenance to the doctrine contended for by plaintiff. But it will be found that the possession which has been held not to be adverse, has been taken and kept without an unqualified claim of title. Thus in *Howard v. Reedy*, 29 Ga. 152, it was proved that the defendant had agreed, at one time, within the statutory period, to put his fence upon the true line when he should reset it. The expressions of the court must be read with this fact in view.

So in *Phelps v. Henry*, 15 Ark. 297, the possession which will not ripen into title is said to be one held without title or claim of right, and only in ignorance of the true boundary. Also in *Brown v. Cockerell*, 33 Ala. 38-45, a case as favorable to plaintiff as any cited, the court says in one place: "If a party occupies land up to a certain fence because he believes it to be the true line, but having no intention to claim up to the fence if it should be beyond the line, an indispensable element of adverse possession is wanting," *i. e.*, claim of title. The intent to claim does not exist, and the claim which is set up is upon condition that the fence is on the true line. This quotation standing alone is seemingly an authority for plaintiff, but further on the court use other language which materially modifies it, for it is said that "possession up to an agreed line is certainly adverse, and the law would be the same if one of the coterminous proprietors should build a fence as the dividing fence, and should occupy with a claim, manifested by words or acts, that such was the line up to which his land extended." So in *Lincoln v. Edgcombe*, 31 Me. 345, the

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charge held right was "that if the tenant claimed title to the fence, that would, in connection with the fence, amount to a disseisin; but if it was built by mistake, and if the tenant had not claimed to own beyond the true line, it was no disseisin."

Again in *Major's Heirs v. Rice*, 57 Mo. 384, the distinction is clearly taken between a conditional and an unconditional possession and claim of title. Thus, although a line may have been established under a mistake of the real facts, says the court: "It is no sort of odds how a line is made, so that it be taken and considered the true line by the adjoining proprietors, and the party possessing up to it claims the land adversely to all others as his own. If he maintains his possession and claim for ten consecutive years, the land becomes his under the statute of limitation by virtue of adverse possession. But where parties assume a line as the true line, but with the understanding all the time that they only claim to the extent of their paper titles and are to relinquish the fenced land if it should turn out to be a mistake, a claim thus conditionally made will not support a plea of the statute."

The supreme court of the United States uses this language: "Wherever the poof is, that one in possession holds for himself to the exclusion of all others, this possession must be adverse to all others." (*Bradstreet v. Huntington*, 5 Pet. 402, 440.) And again in *Ewing v. Burnett*, 11 Id. 41, 52: "It is well settled that to constitute an adverse possession there need not be a fence, building, or other improvement made. * * * It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years after an entry under claim and color of title. * * * Where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant without interruption, * * * such acts are evidence of an ouster of a former owner, and an actual adverse possession against him." The foregoing citations show that the defendant's possession must be regarded as

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adverse as to all the land inside the hedge, and having been continued uninterruptedly under the eye of the plaintiff and his grantees for more than five years, the right of the plaintiff to maintain this action is barred.

Upon another ground the defendant has a good defense, that is, acquiescence in the location of the division line on the part of plaintiff for more than five years. This defense is entirely distinct from, and independent of, the statute of limitations. The doctrine in regard to it is thus stated by the supreme court of California: "The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line according to the calls of their deeds, they are, thereafter, precluded from saying it is not the true line." (*Sneed v. Osborn*, 25 Cal. 619.) That court inclines to the opinion that the time mentioned must at least equal that fixed by the statute of limitations to bar a right of entry, citing *Jackson v. Ogden*, 7 Johns. 238, and numerous other cases.

Acquiescence in an agreed line for more than twenty years is conclusive against a right of recovery. (*Boyd v. Graves*, 4 Wheat. 513.) And it is held that acquiescence for a great number of years is conclusive evidence of an agreement to that line. No express agreement need be shown. (*Rockwell v. Adams*, 7 Cow. 761.) A line which parties have agreed to, either expressly or by acquiescence, will not be disturbed. (*McCormick v. Barnum*, 10 Wend. 105. See *Riley v. Griffin*, 16 Ga. 141.) Standing by while a party subjected himself to expenses in regard to the land, which he would not have done had not the line been located as it was, may perhaps warrant the presumption of a grant within the statute period. (*Adams v. Rockwell*, 16 Wend. 285-302.) Long acquiescence in the location of a fence as a dividing line estops the parties from controverting the correctness of the location. (*Columbet v. Pacheco*, 48 Cal. 395.) The acquiescence in this case has been for more than the period prescribed by the statute of limitations of

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Points decided.

Nevada, and the plaintiff can not now question the boundary so long agreed to.

The defendant has never claimed title to the land lying between the hedge and the fence. He says that he claimed title to the hedge as upon the true line, but set the fence a little outside of it as a protection to his hedge. The judgment will have to be in favor of plaintiff for the possession of so much of the land described in the complaint as lies outside of the hedge, and no more.

LOUIS A. LAURIAT v. J. A. STRATTON ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 19, 1880.

1. **CESTUI QUE TRUST.**—In a suit by or against trustees concerning the trust property, the *cestui que trust* are necessary parties.
2. **REDEMPTION.**—The Or. Civ. Code, sections 410-414, provides that in a suit to enforce the lien of a mortgage, subsequent incumbrancers must be made parties thereto, and that the decree therein shall ascertain and determine the amount and priority of the liens of all such parties, and direct that the premises be sold and the proceeds applied to the satisfaction of the debts secured thereby in the order specified therein; and that process to enforce such decree should issue upon the joint application of the parties or the order of the court: *Held*, that a sale in pursuance of such decree was a sale in pursuance of the decree and upon the process of each of the lien creditors provided for in the decree, and extinguished their liens, and therefore neither of them had a right to redeem the premises from the purchaser at such sale under section 297 of said code, which gives the right of redemption only to a creditor having a lien upon the property sold.
3. **STATE DECISION.**—It is the law of the national courts that in the application of a statute of the state or a rule of law concerning the title to real property, they will follow the settled construction of the statute or application of the rule made by the highest court of the state; but where there is but one decision of such court, which clearly appears to have been made upon a misapprehension of the terms of the statute and against the plain letter and purpose of it, the court declines to follow it.
4. **REDEMPTION BY JUDGMENT DEBTOR.**—Under sections 300 and 301 of the Or. Civ. Code, a redemption by a judgment debtor or his successor in interest, whether made before or after the confirmation of the sale, terminates the effect thereof, and no further redemption can be had thereon or by reason of it.

Before DEADY, District Judge.

THIS suit is brought by Louis A. Lauriat, a citizen of Massachusetts, against J. A. Stratton, C. H. Hall, and Mary R., his wife, citizens of Oregon, to annul and set aside a sheriff's deed to said Stratton for a certain tract of land, situated in Marion county, the same being a portion of the north half of the donation No. 46, granted to A. F. Waller and wife, and containing thirty-five acres, or to compel said Stratton to convey the same to the plaintiff.

The defendants demur to the bill for want of equity, and that the said C. H. Hall and Mary, his wife, are not proper parties to the suit.

W. B. Gilbert, for the plaintiff.

Walter W. Thayer, for the defendants.

DEADY, J. The material facts stated in the bill are that in September, 1878, Hessie J. Shane, the wife of T. A. Shane, purchased the premises of Mary R. Hall, and the same were, by said Mary R., and C. H., her husband, then conveyed to said Hessie J., subject, however, to two certain mortgages thereon, executed by said Hall and wife; the one on January 1, 1877, to Charles Swegle, to secure the payment of one thousand five hundred dollars, with interest at one per cent. per month, the other on September 7, 1878, to E. N. Cooke, to secure the payment of one thousand two hundred dollars, with like interest; that said Hessie J. entered upon and took possession of the premises at the date of such conveyance to her, and has ever since continued to occupy the same; that in February, 1879, said Swegle brought a suit to enforce the lien of his mortgage in the circuit court of the state for Marion county, making the said Hall and wife, Shane and wife, and Cooke, defendants therein; that the said Hall and wife and Cooke answered the complaint, alleging that said mortgage to Cooke was made in trust for said Mary R., and asking the court to correct a mistake in the description therein, and that the remainder of the proceeds of the sale of the premises, after satisfying the

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debt of Swegle, if any, be retained by the court to await the determination of a suit then pending in said circuit court between said Hall and wife and Shane and wife, to cancel and annul the conveyance aforesaid to said Hessie J.; that said circuit court on March 8, 1879, made a decree in the suit of said Swegle, to the effect that the mortgage of Cooke was made in trust for said Mary R., and that the mistake in the description be corrected; that the premises be sold and the proceeds applied to the payment of Swegle's debt, and the surplus, if any, be paid to Cooke as trustee, and that the defendants and all persons claiming under said Hall and wife after January 2, 1877, were thereby barred and foreclosed of all liens or interest or equity of redemption in the premises; that on May 10, 1879, the sheriff, in pursuance of said decree, duly sold said premises to the attorney for Swegle, the defendant Stratton, subject to redemption, for one thousand eight hundred dollars, that sum being the then amount of Swegle's debt and cost of suit, which sale was afterwards duly confirmed; that on August 5, 1879, said Hessie J. conveyed her interest in the premises to one Clarno and Liebe, in trust, that they would advance the money and redeem the premises for her benefit, which they did, and that by virtue of such decree and sale, the lien of said Cooke upon the premises was extinguished, and said Clarno and Liebe, from the time of said conveyance and redemption, became the owners of the same, freed from said lien; that said Stratton, well knowing this fact, did, on September 22, 1879, as the assignee of the said Cooke mortgage, redeem the said premises from said Clarno and Liebe, who, in ignorance and mistake of their rights and those of said Hessie J., and without her consent or knowledge, received the sum of one thousand nine hundred and sixty-four dollars, paid by said Stratton upon said redemption; that in October, 1879, said Clarno and Liebe reconveyed the premises to said Hessie J., who in November following conveyed the same to the plaintiff; that on the twenty-eighth of the same month the plaintiff duly tendered to said Stratton, on account of the payment made by him on said last-mentioned redemption the sum of one thousand

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nine hundred and seventy-five dollars, upon condition that said Stratton would release to him all claim upon said land by reason of said assignment and "attempted redemption," which offer was not accepted or answered; and that said Stratton, by means of said redemption, has obtained the sheriff's deed to the premises, which are of the present value of about three thousand five hundred dollars.

On the argument, nothing was said in support of the cause of the demurrer that the Halls are not proper parties to the suit. The Cooke mortgage having been made in trust for Mary R. Hall, she is the beneficiary thereof, and therefore a necessary party to any suit concerning the same. (Story Eq. Pl., secs. 207-209.) And C. H. Hall, being her husband, is properly joined with her. The demurrer in this respect is not well taken.

The argument in support of the first ground of demurrer is that the decree and sale in Swegle's suit did not affect the lien of Cooke's mortgage, and that therefore the owner thereof was still a creditor, having a lien by mortgage on the property sold, subsequent in time to that on which it was sold, within the purview of subdivision 2 of section 297 of the Or. Civ. Code, and entitled to redeem the same. In support of this proposition, the only authority cited is *Chavener v. Wood*, 2 Or. 185.

The Civil Code (secs. 410-414) provides for the enforcement or foreclosure of the lien of a mortgage by a suit in equity in which the property subject to the lien shall "be sold to satisfy the debt secured thereby." (Sec. 410.) Any person having a lien upon the property subsequent to the plaintiff must be made a defendant in the suit. (Sec. 411.) When it is adjudged in such suit "that any of the defendants have a lien upon the property, the court shall make a like decree in relation thereto, and the debt secured thereby, as if such defendant were a plaintiff in the suit," and "such decree shall determine and specify" the order in which "the debts secured by such liens shall be satisfied out of the proceeds of the sale of the property." (Sec. 412.)

The decree, in the first instance, is enforced by means of an execution "against the property adjudged to be sold;"

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and if the decree is "in favor of different persons not united in interest," the execution can only issue upon their joint application or by the order of the court upon the motion of either of them. When the decree is also *in personam*, as it may be where there is also a promissory note, or other personal obligation, for the payment of the debt, and "the proceeds of the sale of the property upon which the lien is foreclosed are not sufficient to satisfy the decree as to the sum remaining unsatisfied, the decree may be enforced by an execution, as in ordinary cases;" and in "such case," that is, as to the portion of the decree not satisfied by the proceeds of the sale of the property, the decree, if in favor of different persons not united in interest, "shall be deemed a separate decree, and may be enforced accordingly." (Sec. 413.) The decree has the effect to bar the equity of redemption, but the property sold thereon "may be redeemed in like manner and with like effect," as property sold upon a judgment, "and not otherwise." (Sec. 414.)

In *Frink v. Murphy*, 21 Cal. 112, the court held, but with apparent hesitation and doubt, that a subsequent incumbrancer, who was a party defendant to a suit to enforce the lien of a mortgage, might redeem the property from the purchaser at a sale upon the decree that ascertained and provided for the payment of his debt from the proceeds thereof, but which was not sufficient for that purpose, saying: "Considering the whole system of redemptions as affected by our statutes, we think the phrase 'on which the property was sold' must be held to refer to the lien which the action was brought to enforce, and that it does not apply to the liens of subsequent incumbrancers who are made parties."

But the statute of California did not provide that the decree should determine the rights or make any provision for the benefit of the subsequent incumbrancer, and therefore the adjudication was confined to the right and relief of the plaintiff, and, as incident thereto, cutting off the subsequent incumbrancer's equity of redemption. (Hittell's Laws Cal., secs. 5185-87.) And the court, in *Frink v. Murphy*, say that it was not the practice in that state to make provi-

sion in the decree for the benefit of subsequent incumbrancers.

In *Chavener v. Wood*, *supra*, so far as in point, the case was that the plaintiff had a mortgage upon the interest of I. D. Haines in a certain parcel of land, and Wood had a subsequent mortgage upon the same interest. The premises were sold upon a decree made in a suit brought by Chavener to enforce the lien of his mortgage, to which Wood, as a subsequent incumbrancer, was made a party. A decree was made ascertaining the rights of both parties in the premises, and directing a sale, and that the proceeds be applied in satisfaction of their claims in the order of their priority. At the sale, Chavener became the purchaser, and the sheriff allowed Wood to redeem, upon the assumption that he was still a creditor, having a lien by mortgage upon the property sold. Upon the application of Chavener, the court, Prim, J., set aside the redemption as illegal, and Wood appealed. The supreme court reversed the decision, holding, Shattuck, J., that the sale was made upon the execution of Chavener to satisfy his separate decree, and not that of Wood, and therefore the lien of the latter was not extinguished, and he might redeem. But this conclusion appears to depend upon a misapprehension of the terms of the statute. The opinion assumes that by section 413, *supra*, a decree for the sale of mortgaged premises to satisfy the liens thereon of both the plaintiff and defendant, is in such respect a separate decree as to each, and may be enforced accordingly. But this is clearly a mistake. The decree is not the separate decree of either party, so far as it relates to the sale of the property, but only when and so far as it is or becomes a mere decree for the recovery of money. And therefore when the proceeds of the sale of the mortgaged premises are insufficient to satisfy the whole decree, thereafter, and as to any sum remaining unsatisfied, it is a mere decree for the recovery of money, and may be enforced accordingly. And in "such case," if "the decree is in favor of different persons not united in interest," then it shall be deemed the separate decree of each of them, and may be enforced as such.

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But it matters not how many parties there are to the suit having a lien upon the premises, or whether they are plaintiffs or defendants; so far as such liens are concerned there is but one decree, and this decree ascertains and determines the respective rights in the premises of all the lienholders as if they were all plaintiffs in the case, and directs the sale of the premises to satisfy the same. The execution, which is nothing but a *venditioni exponas*, or order of sale, to enforce this portion of the decree, is the process of all the parties for whose benefit the decree directs the sale to be made. The decree and sale operate to extinguish the lien upon the premises of all the parties alike, and therefore it only exists against the proceeds of the sale. The code (sec. 412) expressly provides that the "debts secured by such liens"—that is, the liens ascertained and determined by the decree—"shall be satisfied out of the proceeds of the sale of the property."

It can not be denied and is admitted, that if the sale was made in pursuance of a decree in favor of Cooke as mortgagee, and upon process to enforce such decree as to his lien as well as that of Swegle, his lien was thereby extinguished. (*Sheperd v. O'Neil*, 4 Barb. 125; *Wood v. Colvin*, 5 Hill, 228; *Ex parte Stevens*, 4 Cow. 133; *Frink v. Murphy*, *supra*, 112.) And it appears to me almost too plain for argument that such and none other is the very effect which the statute gives to this proceeding.

The lien of the Cooke mortgage having been extinguished by the sale upon the decree to enforce the lien thereof, the defendant Stratton, as the assignee of Cooke, had no lien upon the property sold, and therefore no right of redemption under the statute. If he wanted the property at any figure beyond the amount due Swegle he should have overbid him at the sale.

The policy of the statute is to make the property pay the debts of the owner as far as possible. To this end it is provided, that as to all the creditors who are parties to the decree, the property shall be absolutely disposed of at one sale to the highest bidder upon an execution, which is, in legal intendment and effect, the process of all of them. By

this means the interest of the creditors is made to promote a healthy competition at the sale for the benefit of the debtor. But to allow the property to be sold to any one of the creditors for the amount of his debt and costs, upon the understanding that the other creditors whose liens are subsequent in point of time, may protect themselves by redeeming from him and one another, would be to provide in effect that the property should be knocked down to the prior lien creditor for not more than the amount of his debt and costs, subject to the right of redemption by the junior creditors.

Besides, if the lien of the subsequent incumbrancer is not extinguished by the sale, what is there to prevent him from enforcing the decree as to himself by execution? It appears to follow as a logical and legal consequence from the premises, that if his lien is neither extinguished nor satisfied by the sale, and the decree has ascertained the fact and amount of his lien, and directed the premises to be sold to satisfy it, he has his remedy by execution against the property, and may resell it subject to prior incumbrances. And this process may be repeated under like circumstances by every other incumbrancer. But the statute certainly never contemplated such an absurdity, let alone injustice, as this.

The right of redemption is only given as a protection against a sale to which the redemptioner is not a party and therefore can not control, but which may result to his injury. In the very nature of things the right to redeem is inconsistent with the right to sell.

The right to redeem from a sale upon a decree to enforce the lien of a mortgage is given by the statute "in like manner and with like effect," as in the case of property sold on a judgment at law and not otherwise. (Civ. Code, sec. 414.) The plaintiff in the execution, the party for whose benefit or relief the property is sold, has no more right to redeem or reason for so doing in the one case than the other. He causes the sale; it is his act, and he can not annul it or obviate the effects of it by redemption. His means of protection against an improvident sale are ample. He can choose his own time to offer the property for sale, and then,

if need be, he can take it for his debt and costs by bidding that sum for it.

No question is made that the plaintiff is entitled to the relief sought if Stratton had no right to redeem. The redemption was allowed by the sheriff, and although Clarno and Liebe accepted the money from the sheriff, they did so without procuring or consenting to the redemption. In the *People v. Rathbun*, 15 N. Y. 528, it was held, that where a redemption was allowed without authority of law, the purchaser was not estopped to assert his right to the sheriff's deed as against such redemptioner, although he had received the money paid thereon.

In this case the plaintiff has offered to return the money paid on the redemption and is still ready to do so.

Then, as to this point, the case must turn upon the question whether this court will follow the ruling in *Chavener v. Wood*, *supra*, or decide this case according to the plain letter and intention of the statute. It is the established law of the national courts, that in the application of a statute of the state, or a rule of law relating to the title to real property, they will follow the settled construction of the statute or application of the rule made by the highest court of the state. (*Polk's Lessee v. Wendal*, 9 Cranch, 98; *Jackson v. Chew*, 12 Wheat. 162; *Nichols v. Levy*, 5 Wall. 433.)

The propriety, and even necessity of this rule, is admitted. But under the circumstances, I am loath to accept this single decision as the settled construction of the statute. It appears to have been made upon a misapprehension of its provisions, and when brought to the attention of the court will doubtless be corrected. Its application in this case would work a very serious injustice to Hessie J. Shane, or her grantee.

So far, I have considered the case upon the points made in the argument; but upon a further examination of it, it is clear to my mind that the redemption by Clarno and Liebe put an end to the effect of the sale, and prevented any further redemption by any one.

By sections 300 and 301, it is provided that the judgment debtor, or his successor in interest, may redeem at any time prior to the confirmation of sale on certain terms

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therein specified; and also after confirmation of the sale, but in such case only “within the time and upon the terms allowed to a lien creditor.” But “if the judgment debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated, and he shall be restored to his estate.”

At the date of the mortgages to Swegle and Cooke, Mary Hall was the owner of this property, and for the purpose of redemption is to be deemed the judgment debtor in the decree providing for the enforcement of the liens of said mortgages. But at the date of this decree Hessie J. Shane had become the successor in interest of Mary R. Hall, and before the redemption by Stratton, Clarno and Liebe had succeeded to her interest and sustained the same relation to this decree as the successor in interest of a judgment debtor in a judgment at law. A redemption, then, by either of the successors in interest of Mary R. Hall, at any time while the property was subject to redemption, whether before or after the confirmation of the sale, put an end to the proceeding, and thereafter such successor held the property as though no sale of the same had ever been made.

While a judgment debtor who redeems after the confirmation of the sale must as to time and terms redeem as a lien creditor, the effect of such redemption is different. For in case of a redemption by a judgment debtor at any time, whether before or after confirmation of sale, the statute declares in so many words that the effect of it shall be to terminate the proceeding and restore him to his estate. The sale is *functus officio*, and no further redemption can be had thereon or by reason of it. Upon this view of the subject it follows of course that the redemption by Stratton was illegal, and the deed to him from the sheriff is either null and void or received in trust for the person entitled to it, Hessie J. Shane or her successor in interest.

The demurrer is overruled, and the plaintiff is entitled to the relief sought against the defendants, upon the repayment to Stratton of the sum of one thousand nine hundred and sixty-four dollars, with legal interest from the date of its receipt by Clarno and Liebe to November 28, 1879, the date of the offer to return it to him.

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IN RE TIBURCIO PARROTT, ON HABEAS CORPUS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MARCH 22, 1880.

1. **TREATY-MAKING POWER.**—Under section 10, article I of the constitution of the United States, and section 2, article II, the treaty-making power has been surrendered by the states to the national government, and vested in the president and senate of the United States.
2. **TREATIES, EFFECT OF.**—Under article VI, the constitution of the United States, and laws made in pursuance thereof, and treaties made under its authority, are the supreme law of the land, and the judges in every state, both state and national, are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.
3. **CHINESE TREATY WITHIN TREATY-MAKING POWER.**—The provisions of articles V and VI of the treaty with China of June 18, 1868, recognizing the right of the citizens of China to emigrate to the United States for purposes of curiosity, trade, and permanent residence, and providing that Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel and residence as may be enjoyed by the citizens or subjects of the most favored nation (16 Stat. 740), are within the treaty-making power conferred by the constitution upon the president and senate, and are valid, and constitute a part of the supreme law of the land.
4. **CONSTITUTION OF CALIFORNIA—TREATY.**—Any provision of the constitution or laws of California in conflict with the treaty with China is void.
5. **SECTION 2 OF ARTICLE XIX OF THE CONSTITUTION OF CALIFORNIA,** providing that no corporation formed under the laws of the state shall, directly or indirectly, in any capacity, employ any Chinese or Mongolian, and requiring the legislature to pass such laws as may be necessary to enforce the provision, is in conflict with articles V and VI of said treaty with China, and is void.
6. **ACT MAKING IT AN OFFENSE TO EMPLOY CHINESE.**—The act of February 13, 1880, to enforce said article of the constitution making it an offense for any officer, director, agent, etc., of a corporation to employ Chinese, violates the treaty with China, and is void.
7. **THE PRIVILEGES AND IMMUNITIES** which, under the treaty, the Chinese are entitled to enjoy to the same extent as enjoyed by the subjects of the most favored nation, are all those rights which are fundamental, and of right belong to citizens of all free governments; and among them is the right to labor, and to pursue any lawful employment in a lawful manner.
8. **LABOR—PROPERTY.**—Property is everything which has an exchangeable value. Labor is property, and the right to make it available is next in importance to the right to life and liberty.
9. **FOURTEENTH AMENDMENT TO NATIONAL CONSTITUTION.**—The provisions of article XIX of the constitution of California, and said act of the

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- legislature passed to enforce it, prohibiting the employment of Chinese, are also in conflict with the provisions of the fourteenth amendment to the constitution of the United States, and are void on that ground.
10. **SAME.**—Said provisions are in conflict with that part of the said fourteenth amendment which provides that no state shall deprive any person of life, liberty, or property, without due process of law.
 11. **SAME.**—They are also in conflict with that portion of said amendment which provides that no state shall deprive any person within its jurisdiction of the equal protection of the laws.
 12. **CHINESE OR MONGOLIANS** residing within the jurisdiction of California are "persons," within the meaning of the term as used in the said fourteenth amendment to the constitution.
 13. **SECTION 1977 OF THE REVISED STATUTES OF THE UNITED STATES** was passed in pursuance of said fourteenth amendment, and to give it effect; and said constitutional and statutory provisions of the state of California are in conflict with said provision of the R. S.
 14. **DISCRIMINATING LEGISLATION** by a state against any class of persons, or against persons of any particular race or nation, in whatever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws, and is prohibited by the fourteenth amendment.
 15. **THIS INHIBITION OF THE FOURTEENTH AMENDMENT UPON A STATE** applies to all the instrumentalities and agencies employed in the administration of its governments; to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities.
 16. **POWER OVER CORPORATIONS.**—Where state legislation, under the state's reserved power to alter and repeal charters of corporations, comes in conflict with valid treaty stipulations, and with the constitution of the United States, it is void.
 17. **SAME.**—Where the policy of state legislation, under the reserved power of the state to alter or repeal charters of corporations, does not have in view the relations of the corporations to the state as the object to be effected, but seeks to reach the Chinese, and exclude them from a large field of labor, the ultimate object being to drive them from the state, in violation of their rights under the constitution and treaty stipulations—the discriminating legislation being only the means by which the end is to be attained—the end sought is a violation of the constitution and treaty, and the legislation as such is void.
 18. **UNLAWFUL OBJECT.**—Where the object sought is unlawful, it is unlawful to use any means to accomplish the object.
 19. **UNCONSTITUTIONAL ACT.**—That which can not be constitutionally done directly, can not be done indirectly.
 20. **SECTION 31, ARTICLE IV OF THE CONSTITUTION OF CALIFORNIA**, which provides that all general laws passed for the formation of private corporations may be altered from time to time, or repealed, does not authorize the legislature to forbid the employment by corporations of persons of a particular class or nationality. (HOFFMAN, D. J.)

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21. CONSEQUENCES OF A PERSISTENT VIOLATION OF TREATIES BY A STATE DISCUSSED, and attention called to the stringent criminal laws passed by congress to enforce the fourteenth amendment. (SAWYER, C. J.)

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

THE facts sufficiently appear in the opinions, the judges delivering separate opinions.

Hall McAllister, Delos Lake, and T. I. Bergin, for the petitioner.

A. L. Hart, attorney-general, David L. Smoot, state district attorney, Crittenden Thornton, Davis Louderback, and Robert Ash, for the respondent.

HOFFMAN, J. The return in this case shows that the petitioner is imprisoned for an alleged violation of an act of the legislature of this state, approved February 13, 1880. Article XIX, section 2, of the recently adopted constitution of this state, is as follows: "No corporation now existing, or hereafter formed under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as shall be necessary to enforce this provision." In pursuance of this mandate the legislature enacted the law under which the petitioner has been arrested. It is as follows:

"An act to amend the penal code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations.

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. A new section is hereby added to the penal code, to be numbered section 178.

"SEC. 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employee, assignee, or contractor of any corporation now existing, or hereafter formed under the laws of this state, who shall employ in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is

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guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail of not less than fifty nor more than five hundred days, or by both such fine and imprisonment; *provided*, that no director of a corporation shall be deemed guilty under this section who refuses to assent to such employment, and has such dissent recorded in the minutes of the board of directors.

"1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:

"2. For each subsequent conviction such person shall be fined not less than five hundred dollars nor more than five thousand dollars, or by imprisonment not less than two hundred days nor more than two years, or by both such fine and imprisonment.

"SEC. 2. A new section is hereby added to the penal code, to be known as section 179, to read as follows:

"SEC. 179. Any corporation now existing, or hereafter to be formed under the laws of this state, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanor, and, upon conviction thereof, shall, for the first offense, be fined not less than five hundred dollars nor more than five thousand dollars, and upon the second conviction, shall, in addition to said penalty, forfeit its charter and franchise and all its corporate rights and privileges, and it shall be the duty of the attorney-general to take the necessary steps to enforce such forfeiture.

"This act shall take effect immediately."

It is claimed on behalf of the petitioner that this provision of the constitution, and the law passed in pursuance of it, are void because in violation of the fourteenth amendment of the constitution of the United States, and the law passed to enforce its provisions known as the civil rights law; and also of the treaty between the United States and the Chinese empire, commonly called the Burlingame treaty.

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The fourteenth amendment enacts that "no state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The civil rights bill provides that all persons within the jurisdiction of the United States shall have the same rights in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (R. S. 1977.) Section 2164 provides that no tax or charge shall be imposed or enforced by any state, upon any person immigrating thereto from a foreign country, which is not equally imposed and enforced upon every person immigrating thereto from any other foreign country.

Article V of the Burlingame treaty recognizes "the mutual advantage of the free immigration and emigration of the citizens and subjects" (of the United States and of the emperor of China), "respectively, from the one country to the other for purposes of curiosity, or trade, or as permanent residents."

Article VI provides that "reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel, or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."

I. It was not disputed by the attorney-general of California that these provisions of the treaty are within the treaty-making power of the United States, nor that the law under which the petitioner has been arrested, if in violation of those provisions, or those of the fourteenth amendment, or of the civil rights bill, is void, anything in the constitution of the state to the contrary notwithstanding.

But it is urged that the article of the constitution of this state which permits corporations to be formed under general laws, reserves the right to repeal, alter, or amend those laws at the discretion of the legislature; that their repeal

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would at once put an end to the corporate existence of the corporations, and that the right to put an end to their existence involves the right to prescribe the conditions upon which their existence shall be continued; that this right is theoretically and practically without limit, and may be exercised by imposing upon corporations laws for the conduct of their business, and restrictions upon the use and enjoyment of their property, which would be unconstitutional and void if applied to private persons, and which may have the effect to defeat the object of the association, or to impair or even destroy the beneficial use of its property. The state may, therefore, in the exercise of this reserved power, prescribe what persons may be employed by corporations organized under its laws, their number, their nationality, perhaps even their creed. It may determine what shall be their age or complexion, their height or their weight, the number of hours they shall work in a day, or the number of days in a week, and the rate of their wages.

These illustrations may seem extravagant, but they were all either recognized by counsel as within the scope of the reserved power, or else they are legitimate examples of the mode in which the reserved power, as claimed, might be exercised. For all such legislation the only remedy of the corporations is to disincorporate and cease to exist.

Such being the reserved power of the state over the creatures of its laws, it is urged that the treaty was not intended, and can not be construed, to impair that right, any more than it could be deemed to abridge the right to enact laws in the interest of the public health, safety, or morals, usually known as police laws, or to regulate the making of contracts by providing who shall be incompetent to make them, as infants, married women, and the like.

When we consider the vast number of corporations which have been formed under the laws of this state, the claim thus put forth is well fitted to startle and alarm. It amounts in effect to a declaration that the corporations formed under the laws of this state, and their stockholders, hold their property, so far as its beneficial use and enjoyment are concerned, at the mercy of the legislature, and that rights

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which in the case of private individuals would be inviolable, have for them no existence.

The circumstances which led to the insertion in charters of incorporation of the reservation in question are well known. The supreme court having decided that a charter of a literary institution was a contract, and therefore protected by the provision in the constitution which forbids the states to make any law impairing the obligation of contracts, the reservation clause was introduced in order to withdraw the contract from the operation of the constitutional inhibition, and to retain to the authority which created the corporation the right to resume the granted powers, or to modify them, as the public interests might require. It may confidently be affirmed that it was not intended to authorize the exercise of the unrestrained power over the operations of corporations, and the use of their property, contended for at the bar.

The adjudged cases, though they contain no precise definition of the extent and limits of this power, applicable to all questions which may arise, are nevertheless full of instruction on the subject. In *The Sinking Fund cases*, 99 U. S. 720, Mr. Chief Justice Waite, delivering the opinion of the court, says: "That this power has a limit, no one can doubt. All agree that it can not be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made, but, as was said by this court, through Mr. Justice Clifford, in *Miller v. The State*, 15 Wall. 498, 'it may safely be affirmed that the reserved power may be exercised to almost any extent to carry into effect the original purposes of the grant, or to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;' and again, in *Holyoke Company v. Lyman*, Id. 519, 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of a corporation.' Mr. Justice Field, also speaking for the court, was even more explicit, when, in *Tomlinson v. Jessup*, Id. 459, he said 'the reservation affects

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the entire relation between the state and the corporation, and places under legislative control all *rights and privileges* derived by its charter directly from the state.' And again, as late as *Railroad Company v. Maine*, 96 U. S. 510, 'by the reservation the state retained the power to alter it (the charter) in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges, and immunities.' Mr. Justice Swayne, in *Shields v. Ohio*, 95 Id. 324, says, by way of limitation, 'the alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration.'"

In his dissenting opinion in this case, Mr. Justice Field reproduces and explains the language used by him in *Tomlinson v. Jessup*, and *Railroad Company v. Maine*. He says: "The object of a reservation of this kind in acts of incorporation, is to insure to the government control over corporate franchises, rights, and privileges, which, in its sovereign or legislative capacity, it may call into existence, not to interfere with contracts which the corporation, created by it, may make; such is the purport of our language in *Tomlinson v. Jessup*, where we state the object of the reservation to be, 'to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference;' and 'that the reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities *derived by its charter directly from the state.*' (5 Wall. 354.) The same thing we repeated, with greater distinctness, in *Railroad Company v. Maine*, where we said, that 'by the reservation, the state retained the power to alter the act incorporating the company, in all particulars *constituting the grant to it of corporate rights, privileges, and immunities;*' and that, 'the existence of the corporation and its franchises and immunities, derived directly from the state, were thus kept under its control.' But we

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added 'that the rights and interests acquired by the company, *not constituting a part of the contract of incorporation, stand upon a different footing.*'" (96 U. S. 499.)

(The italics are the learned justice's own.)

In *Commonwealth v. Essex Co.*, 13 Gray (Mass.) 239, Mr. Justice Shaw says: "It seems to us that this power must have some limit, though it is difficult to define it. * * * Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted is this: That where, under a power in a charter, rights have been acquired, and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." (P. 253.)

"This rule," says Mr. Justice Strong, "has been recognized ever since." (99 U. S. 742.)

The language of Mr. J. Story in the *Dartmouth College case*, which, as before remarked, first led to the general insertion of the reservation clause in charters of incorporation, clearly indicates its object. "When," he observes, "a private corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown can not, in virtue of its prerogative, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or augment or diminish the number of the trustees, or remove any of the members, or change or control the administration of the funds, or compel the corporation to receive a new corporature." (4 Wheat. 675.)

"Probably," Mr. J. Bradley observes, "in view of the somewhat unexpected application of the clause" (forbidding the states to impair the obligation of contracts), "operating as it did to deprive the states of nearly all legislative control over corporations of their own creation, the courts have given a liberal construction to the power to alter, amend, and repeal a charter, and have sustained some acts of legis-

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lation made under such a reservation which are at least questionable." (99 Otto, 748.)

In *Miller v. The State*, 15 Wall. 498, the supreme court says: "Power to legislate founded upon such a reservation in a charter to a private corporation is certainly not without limit, and it may well be admitted that it can not be exercised to take away or destroy rights acquired by virtue of such charter, and which by a legitimate use of the powers granted, have become vested in the corporation; but it may be safely affirmed that the reserved power may be exercised to almost any extent to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of the assets. Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to any stock, whose subscription is conditional, to waive any of the conditions of their contract." (*State v. Adams*, 44 Mo. 570; *Zabriskie v. R. R. Co.*, 3 C. E. Green, 180; *R. R. Co. v. Veazie*, 38 Me. 581; *Sage v. Dillard*, 15 B. Mon. 359.)

These citations sufficiently indicate the nature, object, and, to a certain degree, the extent of the powers reserved in the clause in question; and although they do not define their limits in every direction, they lay down certain *ne plus ultra* boundaries which the legislature may not pass. Over all the rights, privileges, and immunities conferred by the charter upon the corporation, and which are derived from the charter, the legislature has control. But, in the language of the supreme court, "the rights and interests acquired by the company, and not constituting a part of the contract of corporation, stand upon a different footing." (96 Otto, 499.) The right to use a corporate name and seal, the right, under that name, to sue and be sued, to acquire property and to contract, are rights which owe their existence to the charter. But when a contract has been made, or prop-

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erty acquired by a lawful exercise of the granted powers, the contract is as inviolable, and the right of property with everything incidental to that right as sacred, as in the case of natural persons.

It is not merely the title to the property that is protected from legislative confiscation, but that which gives value to all property, the right to its lawful use and enjoyment. It would be a "mockery, a delusion, and a snare" to say to a corporation: "The title to the property you have lawfully acquired we may not disturb, but we may prescribe such condition as to its use, as will utterly destroy its beneficial value." It need hardly be said that no reference is here intended to the power of the state to enact police laws—that is, laws to promote the health, safety, or morals of the public. To such laws corporations are amenable to the same extent as natural persons, and no further. The law in question does not affect to be a police law. Its validity, if applied to natural persons, was not contended for at the bar. The authority to pass it was sought to be derived exclusively from the reserved power over corporations. It forbids the employment of Chinese. If the power to pass it exists, it might equally as well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest. It might, as avowed at the bar, have prescribed a rate of wages, hours of work, or other conditions destructive of the profitable use of the corporate property.

Such an exercise of legislative power can only be maintained on the ground that stockholders of corporations have no rights which the legislature is bound to respect. Behind the artificial or ideal being created by the statute and called a corporation are the corporators—natural persons who have conveyed their property to the corporation, or contributed to it their money, and received as evidence of their interest shares in its capital stock. The corporation, though it holds the title, is the trustee, agent, and representative of the shareholders, who are the real owners. And it seems to me that their right to use and enjoy their property

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is as secure under constitutional guarantees as are the rights of private persons to the property they may own. That the law in question, substantially and not merely theoretically, violates the constitutional rights of the owners of corporate property, can readily be shown. Already several corporations representing investments of great magnitude submitting to its commands, have ceased their operations. It is probable that if the law be declared valid, many more will be forced to follow their example. It applies to all corporations formed under the laws of this state. If its provisions be enforced, a bank or a railroad company will lose the right to employ a Chinese interpreter to enable it to communicate with Chinese with whom it does business. A hospital association would be unable to employ a Chinese servant to make known, or to minister to, the wants of a Chinese patient; and even a society for the conversion of a heathen, would not be allowed to employ a Chinese convert to interpret the gospel to Chinese neophytes.

The language of the supreme court in *Shields v. Ohio*, 95 U. S. 324, has already been quoted: "The alterations must be reasonable; they must be made in good faith, and consistent with the object and scope of the act of incorporation. * * * Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration." Can it be pretended that this law, of the effect of which I have given these examples, is reasonable as between the state and the corporations, without regard to the treaty rights of Chinese residents? Can it be said to be in good faith—that is, in the fair and just exercise of the reserved power to regulate corporations for the protection of the stockholders, their creditors, and the general public? Is it not rather an attempt, "under the guise of amendment or alteration," to attain quite a different, and, as I shall presently show, an unconstitutional object, viz., to drive the Chinese from the state, by preventing them from laboring for their livelihood? I apprehend that, to these questions, but one candid answer can be given.

I am, therefore, of opinion that, irrespective of the rights secured to the Chinese by the treaty, the law is void, as not

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being a "reasonable," *bona fide*, or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, Germans, or Americans; that the corporations have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms as may be agreed upon, subject only to such police laws as the state may enact with respect to them, in common with private individuals.

In the foregoing observations I have treated the question discussed as if the reservation had been found in a special charter, by which the corporation was created and its franchises conferred. I have endeavored to show that such a reservation can not be construed to authorize the legislature to impair the obligation of any contract lawfully made by a corporation, or to deprive the corporation of any vested property or rights of property lawfully acquired. But in this state the constitution forbids the legislature to create private corporations by special act. They may be "formed" (*i. e.*, by private persons) "under general laws." All persons who choose to avail themselves of the provisions of these laws may acquire the franchises which they offer. These general laws may be repealed or altered. What would be the effect upon the existence or rights of corporations already formed, of the repeal or alteration of these laws, it is not necessary here to inquire. It is sufficient to say that the legislative power can not be greater under such a provision than under a reservation of a power to amend or repeal contained in a charter, by which a corporation is created and its franchises conferred.

II. But even if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in

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conflict with the treaty. "In every such case" (where the federal government has acted) "the act of congress, or the treaty is supreme, and the laws of the state, though enacted in the exercise of powers not controverted, must yield to it." (*Per Mr. C. J. Marshall, in Gibbons v. Ogden*, 9 Wheat. 211.) The principle thus enunciated by the great chief justice has never since been disputed. (*Henderson v. Mayor of New York*, 92 U. S. 272; *R. R. Company v. Husen*, 95 Id. 472.) The article of the constitution of this state under which the law under consideration was enacted, is as follows:

ARTICLE XIX.

CHINESE.

"SECTION 1. The legislature shall prescribe all necessary regulations for the protection of the state, and the counties, cities, and towns thereof from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids, afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the well-being or peace of the state, and to impose conditions upon which such persons may reside in the state, and to provide the means and mode of their removal from the state, upon failure or refusal to comply with such conditions; *provided*, that nothing contained in this section shall be construed to impair or limit the power of the legislature to pass such police laws or other regulations as it may deem necessary.

"SEC. 2. No corporation now existing, or hereafter formed under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as may be necessary to enforce this provision.

"SEC. 3. No Chinese shall be employed on any state, county, municipal, or other public work, except in punishment for crime.

"SEC. 4. The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of

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this state, and the legislature shall discourage their immigration by all the means within their power."

The end proposed to be attained by this extraordinary article is clearly, and even ostentatiously, avowed. Its title proclaims that it is directed against the Chinese. It forbids their employment by any but private individuals, and when through the operation of the laws they shall have become, or be liable to become, vagrants, paupers, mendicants, or criminals, the legislature is directed to provide for their removal from the state, if they fail to comply with such conditions as it may prescribe for their continued residence.

The framers of the article do not seem to have relied upon the efficacy of the provisions imposing such extensive restrictions upon the rights of the proscribed race to labor for their living, to reduce them to the condition of vagrants, paupers, mendicants, or criminals, or persons who "may become" such. The legislature is directed to impose conditions of residence, and provide for the removal of "aliens otherwise dangerous or detrimental to the well-being or peace of the state," and lest any doubt or hesitation should be felt as to the propriety of including wealthy and respectable Chinese in this class, the fourth section declares "the presence of foreigners ineligible to become citizens of the United States" (*i. e.*, the Chinese), to be "dangerous to the well-being of the state." And the legislature is directed to "discourage their immigration by all the means within its power."

Would it be believed possible, if the fact did not so sternly confront us, that such legislation as this could be directed against a race whose right freely to immigrate to this country, and reside here with all "the privileges, immunities, and exemptions of the most favored nation," has been recognized and guaranteed by a solemn treaty of the United States, which not only engages the honor of the national government, but is by the very terms of the constitution the supreme law of the land? The legislature has not yet attempted to carry into effect the mandate of the first section by imposing conditions upon which aliens who

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are or may become vagrants, paupers, mendicants, or criminals may reside in the state, or by providing for their removal. Its action thus far has been limited to forbidding the employment of Chinese, directly or indirectly, by any corporation formed under the laws of this state. The validity of this law is the only question presented for determination in the present case.

In considering this question we are at liberty to look, not merely to the language of the law, but to its effect and purpose. "In whatever language a statute may be framed, its purpose may be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the passenger cases." (*Henderson v. The Mayor etc.*, 92 U. S. 268.) "If, as we have endeavored to show, in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further." (*Chy Lung v. Freeman et al.*, 92 U. S. 279.)

If the effect and purpose of the law be to accomplish an unconstitutional object, the fact that it is passed in the pretended exercise of the police power, or a power to regulate corporations, will not save it. If a law of the state forbidding the Chinese to labor for a living, or requiring them to obtain a license for doing so, would have been plainly in violation of the constitution and treaty, the state can not attain the same end by addressing its prohibition to corporations.

In *Cummings v. The State of Missouri*, Mr. Justice Field, speaking for the court, observes: "Now, as the state, had she attempted the course supposed, would have failed, it must follow that any other mode of producing the same result must equally fail. The provisions of the federal constitution intended to secure the liberty of the citizen can

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not be evaded by the form in which the power of the state is exerted. If this were not so—if that which can not be accomplished by means looking directly to the end can be accomplished by indirect means—the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the constitution intended to guard, which may not be effected.” (4 Wall. 320.)

The application of these pregnant words to the case at bar is obvious. Few will have the hardihood to deny the purpose and effect of the article of the constitution which has been cited. It is in open and seemingly contemptuous violation of the provisions of the treaty, which give to the Chinese the right to reside here with all the privileges, immunities, and exemptions of the most favored nation. It is, in fact, but one and the latest of a series of enactments designed to accomplish the same end.

The attempt to impose a special license tax upon Chinese for the privilege of mining, the attempt to subject them to peculiar and exceptional punishments commonly known as the queue ordinance, have been frustrated by the judgments of this court. The attempt to extort a bond from shipowners as a condition of being permitted to land those whom a commissioner of immigration might choose to consider as coming within certain enumerated classes has received the emphatic and indignant condemnation of the supreme court. (*Chy Lung v. Freeman*, 92 U. S. 275.)

But the question which now concerns us is: Does the law under consideration impair or destroy the treaty rights of Chinese residents? for it may be a part of a system obviously designed to effect that purpose, and yet not of itself be productive of that result. Its practical operation and effect must, therefore, be adverted to. The advantages of combining capital, and restricting individual liability by the formation of corporations, have, from the organization of this state, been recognized by its laws. That method, now universal throughout the civilized world in the prosecution of great enterprises, has in this state received an unprecedented development. Its laws permit the formation of corporations for any purpose for which individuals may law-

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fully associate, and the corporations already formed cover almost every field of human activity. The number of certificates on file in the clerk's office of this county alone was stated at the hearing to be eight thousand three hundred and ninety-seven. The number in the entire state is of course far greater. They represent a very large proportion of the capital and industry of the state. The employment of Chinese, directly or indirectly, in any capacity by any of these corporations is prohibited by the law. No enumeration would, I think, be attempted of the privileges, immunities, and exemptions of the most favored nation, or even of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor. It is as sacred as the right to life, for life is taken if the means whereby we live be taken.

Had the labor of the Irish or Germans been similarly proscribed, the legislation would have encountered a storm of just indignation. The right of persons of those or other nationalities to support themselves by their labor stands on no other or higher ground than of the Chinese. The latter have even the additional advantage afforded by the express and solemn pledge of the nation. That the unrestricted immigration of the Chinese to this country is a great and growing evil; that it presses with much severity on the laboring classes, and that if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese empire, it will be a menace to our peace and even to our civilization, is an opinion entertained by most thoughtful persons.*

The demand, therefore, that the treaty shall be rescinded or modified is reasonable and legitimate. But while that treaty exists, the Chinese have the same right of immigration and residence as are possessed by any other foreigners. Those rights it is the duty of the courts to maintain, and of the government to enforce. The declaration that "the Chinese must go, peaceably or forcibly," is an insolent con-

* See the temperate, but very able article, on "Certain Phases of the Chinese Question" by General John F. Miller, in "The Californian" of March, 1880. Also, an able pamphlet on the same subject by Hon. J. H. Boalt.

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tempt of national obligations and an audacious defiance of national authority. Before it can be carried into effect by force, the authority of the United States must first be not only defied, but resisted and overcome. The attempt to effect this object by violence will be crushed by the power of the government. The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance.

I have considered this case at much greater length than the difficulty of the questions involved required. But I have thought that their great importance, and the temper of the public with regard to them, demanded that no pains should be spared to demonstrate the utter invalidity of this law.

SAWYER, Circuit Judge. The constitution of California, adopted in 1879, provides that "no corporation now existing, or hereafter formed, under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision." (Article XIX, sec. 2.) In obedience to this mandate of the constitution, the legislature, on February 13, 1880, passed an act entitled, "An act to amend the penal code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations," the first section of which statute reads as follows:

"SECTION 1. A new section is hereby added to the penal code, to be numbered section 178.

"SEC. 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employee, assignee, or contractor of any corporation now existing, or hereafter formed, under the laws of this state, who shall employ, in any manner or capacity, upon any work or business of such

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corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail of not less than fifty nor more than five hundred days, or by both such fine and imprisonment: *provided*, that no director of a corporation shall be deemed guilty, under this section, who refuses to assent to such employment, and has such dissent recorded in the minutes of the board of directors.

"1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:

"2. For each subsequent conviction, such person shall be fined not less than five hundred nor more than five thousand dollars, or by imprisonment not less than two hundred and fifty days nor more than two years, or by both such fine and imprisonment."

The petitioner is president and director of the Sulphur Bank Quicksilver Mining Company, a corporation organized under the laws of California before the adoption of the present constitution, but still doing business within the state. Having been arrested and held to answer before the proper state court, upon a complaint duly made, setting out in due form the offense of employing in the business of said corporation certain Chinese citizens of the Mongolian race, created by said act, he sued out a writ of *habeas corpus*, which, having been returned, he asks to be discharged, on the ground that said provisions of the constitution, and act passed in pursuance thereof, are void, as being adopted and passed in violation of the provisions of the treaty of the United States with the Chinese empire, commonly called the "Burlingame treaty," and of the fourteenth amendment to the constitution of the United States; and of the acts of congress passed to give effect to said amendment. The question in this case, therefore, is, as to the validity of said constitutional provision and said act. Article I, section 10, of the constitution of the United States provides that "no state shall enter into any treaty, alliance, or confederation;"

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article II, section 2, that the president "shall have power, by and with the advice and consent of the senate, to make treaties, provided that two thirds of the senators present shall concur;" and article VI, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

There can be no mistaking the significance, or effect of these plain, concise, emphatic provisions. The states have surrendered the treaty-making power to the general government, and vested it in the president and senate; and when duly exercised by the president and senate, the treaty resulting is the supreme law of the land, to which not only state laws, but state constitutions, are in express terms subordinated. Soon after the adoption of this constitution, the supreme court of the United States had occasion to consider this provision, making treaties the supreme law of the land, in *Ware v. Hylton*; and Mr. Justice Chase, speaking of its effect, said: "A treaty can not be the supreme law of the land—that is, of all the United States—if any act of a state legislature can stand in its way. If the constitution of the state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." (3 Dall. 236.) Again: "It is the declared duty of the state judges to determine any constitution or laws of any state contrary to that treaty, or any other made under the author-

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ity of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct." (Id. 237.) And again: "It is asked, did the fourth article intend to annul a law of the state, and destroy rights under it? I answer, that the fourth article did intend to destroy all lawful impediments, past and future; and that the law of Virginia, and the payment under it, is a lawful impediment, and would bar a recovery, if not destroyed by this article of the treaty. * * * I have already proved that a treaty can totally annihilate any part of the constitution of any of the individual states that is contrary to a treaty." (Id. 242-3.)

The case of *Hauenstein v. Lynham*, 100 U. S. 483, being an action by citizens and residents of Switzerland, heirs of an alien who died in Virginia, leaving property which had been adjudged to have escheated to the state, to recover the proceeds of said property, was decided at the present term of the United States supreme court on writ of error to the court of appeals of the state of Virginia. The courts of Virginia had held that, under the laws of Virginia, the proceeds of the property sought to be recovered belonged to the state; but the judgment was reversed by the supreme court of the United States, on the ground that the laws of Virginia were in conflict with a treaty of the United States with the Swiss Confederation. After construing the treaty, the court says: "It remains to consider the effect of the treaty thus construed upon the rights of the parties. That the laws of the state, irrespective of the treaty, would put the fund into her coffers, is no objection to the right, or the remedy claimed by the plaintiffs in error. The efficacy of the treaty is declared and guaranteed by the constitution of the United States." (Id. 488.) The court cites and comments upon *Ware v. Hylton*, *supra*, and then proceeds: "In *Chirac v. Chirac*, 2 Wheat, 259, it was held by this court that a treaty with France gave to the citizens of that country the right to purchase and hold land in the United States, and that it removed the incapacity of alienage, and placed the parties in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any

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importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks*, 10 Wheat. 189, and with respect to the British treaty of 1794, in *Hughes v. Edwards*, 9 Id. 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a state. (*Orr v. Hodgeson*, 4 Wheat. 453.) * * *

"Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this class of cases, says: 'Within these limits, all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power, and may be adjusted by it.' (Treat. on Constitution and Government of the United States, 204.) If the national government has not the power to do what is done by such treaties, it can not be done at all, for the states are expressly forbidden to 'enter into any treaty, alliance or confederation.'" (Id. 489, 490; Const., art. I, sec. 10.) Again: "It must always be borne in mind that the constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. (See also *Shanks v. Dupont*, 3 Pet. 242; *Foster v. Neilson*, 2 Id. 253; *The Cherokee Tobacco*, 11 Wall. 616; Mr. Pinckney's Speech, 3 El. Const. Debates, 231; *People v. Gerke*, 5 Cal. 381.) We have no doubt that this treaty is within the treaty-making power conferred by the constitution. And it is our duty to give it full effect." (Id. 490.)

If, therefore, the constitutional provision and the statute in question, made in pursuance of its mandate, are in conflict with a valid treaty with China, they are void. The treaty between the United States and China of July 28, 1868, contains the following provisions:

"ARTICLE V. The United States and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the

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other for purposes of curiosity, of trade, or as permanent residents.

“ART. VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. And reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.” (16 Stat. 740.)

Thus the right of the Chinese to change their homes, and to freely emigrate to the United States for the purpose of permanent residence, is, in express terms, recognized; and the next article, in express terms, stipulates that Chinese residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to residence, as may there be enjoyed by the citizens and subjects of the most favored nation. The words “privileges and immunities,” as used in the constitution in relation to rights of citizens of the different states, have been fully considered by the supreme court of the United States, and generally defined; and there can be no doubt that the definitions given are equally applicable to the same words as used in the treaty with China. In the *Slaughter-house cases*, the supreme court approvingly cites and reaffirms from the opinion of Mr. Justice Washington, in *Corfield v. Coryell*, the following passage: “The inquiry is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong to the rights of citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government,

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with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." The court then adds: "The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is established." (16 Wall. 76.)

And in *Ward v. Maryland*, the same court observes: "Beyond doubt these words (privileges and immunities) are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate," etc. (12 Wall. 430.)

So in the *Slaughter-house cases*, Mr. Justice Field remarks upon these terms: "The privileges and immunities designated are those which of right belong to citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons." (16 Wall. 97.)

Mr. Justice Bradley, in discussing the question as to what is embraced in the "privileges and immunities" secured to the citizens, among other equally pointed and emphatic declarations, says: "In my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of the most valuable rights, and one which the legislature of a state can not invade, whether restrained by its own constitution or not." (16 Wall. 113, 114.) He also enumerates as among the fundamental rights embraced in the privileges and immunities of a citizen all the absolute rights of individuals classed by Blackstone under the three heads: "The right of personal security; the right of personal liberty; and the right of

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private property." (Id. 115.) And in relation to these rights says: "In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section." (Id. 122.)

And Mr. Justice Swayne supports this view in the following eloquent and emphatic language: "Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property." (Id. 127.)

Some of these extracts are from the dissenting opinions, but not upon points where there is any disagreement. There is no difference of opinion as to the signification of the terms, "privileges and immunities." Indeed, it seems quite impossible that any definition of these terms could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence. As to by far the greater portion of the Chinese, as well as other foreigners who land upon our shores, their labor is the only exchangeable commodity they possess. To deprive them of the right to labor, is to consign them to starvation. The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man, wherever he may be permitted to be, of which he can not be deprived, either under the guise of law or otherwise, except by usurpation and force. Man ate and died. When God drove him "forth

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from the Garden of Eden to till the ground, from whence he was taken," and said to him, "in the sweat of thy face shalt thou eat bread, till thou return unto the ground," he invested him with an inalienable right to labor in order that he might again eat and live. And this absolute, fundamental, natural right was guaranteed by the national government to all Chinese who were permitted to come into the United States under the treaty with their government, "for the purposes of curiosity, of trade, or as permanent residents," to the same extent as it is enjoyed by citizens of the most favored nation. It is one of the "privileges and immunities" which it was stipulated that they should enjoy in that clause of the treaty which says: "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation." And any legislation or constitutional provision of the state of California which limits or restricts that right to labor to any extent, or in any manner not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty; and such are the express provisions of the constitution and statute in question.

The same view of the effect of the treaty was taken in *Baker v. Portland*, by Judge Deady, of the district of Oregon, and concurred in by Mr. Justice Field on application for rehearing. (5 Saw. 566-572.) I should not have deemed it necessary to cite so fully the opinions of others on a proposition so plain to my mind, but for the gravity of the question, and the fact that the people of California and their representatives in the legislature have incorporated in the constitution of the state, and in legislation had in pursuance of the constitutional mandate, after full discussion, provisions utterly at variance with the views expressed. Under such circumstances I feel called upon to largely cite the thoroughly considered and authoritative views of those distinguished jurists upon whom will devolve the duty of ultimately determining the points in controversy.

As to the point whether the provision in question is

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within the treaty-making power, I have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the constitution in unlimited terms. Beside, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. If it has authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid—and so the authorities already cited hold—then it, certainly, must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. The former must include the latter—the principal, the incidental power. (See also *Holden v. Joy*, 17 Wall. 242, 243; *U. S. v. Whisky*, 93 U. S. 196–198.)

But the provisions in question are also in conflict with the fourteenth amendment of the national constitution, and with the statute passed to give effect to its provisions. The fourteenth amendment, among other things, provides that “no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” Section 1977 of the R. S., passed to give effect to this amendment, provides that “all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce

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contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

It will be seen that, in the latter clause, the words are "*any person*," and not "*any citizen*," and prevent any state from depriving "*any person*" of life, liberty, or property without due process of law, or from denying to "*any person* within its jurisdiction the equal protection of the law." In the particulars covered by these provisions, it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing; and under the same protection as are the rights of citizens themselves under other provisions of the constitution; and, in consonance with these provisions, the statute enacts that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." Chinese residing in California, in pursuance of the treaty stipulations, are "persons within the jurisdiction of the state," and "of the United States," and, therefore, within the protection of these provisions. And contracts to labor, such as all others make, are contracts which they have a "right to make and enforce," and the law under which others' rights are protected, are the laws to which they are entitled to the "equal benefits," "as is enjoyed by white citizens."

It would seem that no argument should be required to show, that the Chinese do not enjoy the equal benefit of the laws with citizens, or "the equal protection of the laws," where the laws forbid their laboring, or making and enforcing contracts to labor, in a very large field of labor which is open without limit, let, or hindrance to all citizens and all other foreigners, without regard to nation, race, or color. Yet, in the face of these plain provisions of the national constitution and statutes, we find both in the constitution

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and laws of a great state, and member of this union, just such prohibitory provisions and enactments discriminating against the Chinese. Argument and authority, therefore, seem still to be necessary, and, fortunately, we are not without either. From the citations already made, and from many more that might be made from Justices Field, Bradley, Swayne, and other judges, it appears that to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property, within the meaning of the fourteenth amendment and the act of congress. Says Mr. Justice Bradley: “For the preservation, exercise, and enjoyment of these rights, the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade, as may seem to him most conducive to that end. Without this right he can not be a free man. This right to choose one’s calling is an essential part of that liberty, which it is the object of government to protect; and a calling, when chosen, is a man’s property and right. Liberty and property are not protected where those rights are arbitrarily assailed.” (16 Wall. 116.) Whatever may be said as to this clause of the amendment, there can be no doubt as to the effect of the act. With respect to the last clause, Mr. Justice Bradley says, of a law which interferes with a man’s right to choose and follow an occupation: “Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.” (Id. 122.) And Mr. Justice Swayne: “The equal protection of the laws places all upon an equal footing of legal equality, and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness.” (Id. 127.) In *Ah Kow v. Nunan*, 5 Saw. 562, Mr. Justice Field observes: “But in our country, hostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the constitution. That amendment, in its first section, declares who are citizens of the United States, and then enacts that no state shall make or enforce

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any law which shall abridge their privileges and immunities. It further declares that no state shall deprive any person (dropping the distinctive term citizen) of life, liberty, or property, without due process of law, nor deny to any person the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality and protection thus assured to every one while within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment."

And the same views are expressed with equal emphasis in *In re Ah Fong*, 3 Saw. 157. Discriminating state legislation has often been held void by the supreme court, as being in violation of other provisions of the national constitution, no more specific than the fourteenth amendment. (*Welton v. Missouri*, 91 U. S. 277, 282; *Cook v. Pennsylvania*, 97 Id. 572, 573, and numerous cases cited.)

Since the foregoing was written, I have received the opinion of the supreme court of the United States in *Strauder v. The State of West Virginia*, recently decided, which appears to me to authoritatively dispose of the point now under consideration. The case was an indictment of a colored man for murder, and the statute of West Virginia limited the qualified jurors to white citizens. The statute stating the qualifications of jurors was in the following words: "All white male persons, who are twenty-one years of age and who are citizens of this state, shall be liable to serve as jurors, except as herein provided"—the exceptions being state officials. This was claimed to be a violation of

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the fourteenth amendment, as excluding colored citizens otherwise qualified from jury service; and the supreme court so held. The court, in deciding the case, says the fourteenth amendment "ordains that no state shall deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory; but they contain a necessary implication of a positive immunity or right most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively, as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of the enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race. That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination, ought not to be doubted, nor would it be if the persons excluded by it were white men." (Since reported; see 100 U. S. 307, 308.) In speaking of the act to enforce this amendment, the court further says that sections 1977 and 1978 of the R. S., before cited, "partially enumerate the rights and immunities intended to be guaranteed by the constitution;" and that "this act puts in the form of a statute what had been substantially ordained by the constitutional amendment." (Id. 311.)

If this exclusion of colored men from sitting upon a jury by implication is a violation of the constitution, as denying the equal protection of the laws to colored persons, *a fortiori* must the express, positive provisions of the constitution and act of the legislature of the state of California be in conflict with that instrument, as denying the equal protection

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of the laws to the Chinese residents of the state. Upon reason and these authorities, then, it seems impossible to doubt that the provisions in question are both in letter and spirit in conflict with the constitution and laws of the United States, as well as with the stipulations of the treaty with China. And this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States. The protection is given by the constitution itself, and the laws passed to give it effect, irrespective of treaty stipulations.

But it is urged on behalf of the respondent, that, under the provisions of article XII of the state constitution, providing that "all laws * * concerning corporations * * may be altered from time to time or repealed," the power of the legislature over corporations is absolutely unlimited; that it may, by legislation under this reserved power, impose any restrictions or limitations upon the acts and operations of corporations, however unreasonable, stringent, or injurious to their interests; and as a penalty for violating such restrictions, destroy them, and criminally punish their officers, agents, servants, employees, assignees, or contractor; that, as a condition of continued existence, they may be prohibited from employing Chinese, and the prohibition enforced against the corporation and the persons named by means of the penalties indicated; and thus, by means of the state's control over the corporation created by its authority, it can indirectly accomplish the purpose of excluding the Chinese from, perhaps, their largest and most important field of labor—a purpose which could not be accomplished by direct means. This position the attorney-general and the other counsel for the respondent most earnestly press, and upon it they most confidently rely.

I do not assent to any such unlimited power over corporations. There must be—there is—a limit somewhere. That there is such a limit is recognized and expressly asserted in numerous cases by the supreme court of the United States, and by the highest courts of many of the states; and I know

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of none to the contrary. But precisely where the line is to be drawn, I confess, in the present state of the authoritative adjudications, I am unable to say. I am inclined to the opinion, however, that it would exclude legislation of the character in question, even if it concerned the state and the corporations alone, and did not conflict with other rights protected by treaties with foreign nations, or by the constitution of the United States, the supreme law of the land. But assume it to be otherwise. When the state legislation affecting its corporations comes in conflict with the stipulations of valid treaties, and with the national constitution, and laws made in pursuance thereof, it must yield to their superior authority. And such, in my judgment, are the provisions in question. The policy of the constitutional provision and statute in question does not have in view the relations of the corporation to the state, as the object to be effected or accomplished; but it seeks to reach the Chinese, and exclude them from a wide range of labor and employment, the ultimate end to be accomplished being to drive those already here from the state, and prevent others from coming hither—the discriminating legislation being only the means by which the end is to be attained, the ultimate purpose to be accomplished. The end sought to be attained is unlawful. It is in direct violation of our treaty stipulations and the constitution of the United States. The end being unlawful and repugnant to the supreme law of the land, it is equally unlawful, and equally in violation of the constitution and treaty stipulations, to use any means, however proper, or within the power of the state for lawful purposes, for the attainment of that unlawful end, or accomplishment of that unlawful purpose. It can not be otherwise than unlawful to use any means whatever to accomplish an unlawful purpose. This proposition would seem to be too plain to require argument or authority. Yet there is an abundance of authority on the point, although perhaps not stated in this particular form. (*Brown v. Maryland*, 12 Wheat. 419; *Ward v. Maryland*, 12 Wall. 431; *Woodruff v. Parham*, 8 Id. 130, 140;

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Hinson v. Lott, Id. 152; *Welton v. Missouri*, 91 U. S. 279, 282; *Cook v. Pennsylvania*, 97 Id. 573.)

These cases hold that the power of taxation, and power to require licenses, are legitimate powers to be exercised without discrimination; but they are unlawful and unconstitutional when used to discriminate against foreign goods or manufactures of other states. That is to say, they are constitutional and lawful when used for a constitutional and lawful purpose, but unlawful and in violation of the constitution when used to attain an unlawful, or unconstitutional end. And whatever form the law may take on, or in whatever language be couched, the court will strip off its disguise, and judge of the purpose from the manifest intent as indicated by the effect. In *Cummings v. Missouri*, Mr. Justice Field, in speaking for the court, says: "The difference between the last case supposed, and the case as actually presented, is one of form only, and not substance.

* * * The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker, in the case supposed, would be openly avowed; in the case existing, it is only disguised. The legal result must be the same; for what can not be done directly can not be done indirectly. The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizens should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." (4 Wall. 325. See also *Henderson v. Mayor of New York*, 92 U. S. 268; *Chy Lung v. Freeman*, Id. 279; *Railroad Co. v. Husen*, 95 Id. 472.)

In *Doyle v. Continental Insurance Co.*, 94 U. S. 535, most confidently relied on by the respondent, the end to be accomplished—the exclusion of a foreign corporation from doing business in the state, except upon conditions prescribed by the state—was lawful, and the means adopted lawful. There were no rights secured by treaty or the na-

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tional constitution violated. The state and the foreign corporation were the only parties, and their rights the only rights affected. Had the legislature, instead of prohibiting the corporation from doing business in the state as a penalty for violation of the conditions prescribed, attempted to enforce compliance by criminally punishing the agent, who transferred the action brought against the corporation from the state to the national court, the question would certainly have been different, and the statute making the transfer a misdemeanor would have been void; for under the constitution of the United States, the foreign corporation had a right to transfer the case, of which the state could not by law, nor the corporation by stipulation, deprive it, as was held in *Insurance Company v. Morse*, 20 Wall. 445. It being lawful to transfer, and the right to transfer being secured by the national constitution, it was incompetent for the legislature to make the transfer an offense, and punish it as such, in violation of the supreme law of the land. The act could not at the same time be both lawful and criminal. And this is the plain distinction between the case relied on, and the one now under consideration.

The object, and the only object, to be accomplished by the state constitutional and statutory provisions in question is, manifestly, to restrict the right of the Chinese residents to labor, and thereby deprive them of the means of living, in order to drive those now here from the state, and prevent others from coming hither; and this abridges their privileges and immunities, and deprives them of the equal protection of the laws, in direct violation of the treaty and constitution—the supreme law of the land. To perceive that the means employed are admirably adapted to the end proposed, it is only necessary to consider for a moment some of the leading provisions of article XIX of the state constitution. Section 1 provides that “the legislature shall prescribe all necessary regulations for the protection of the state * * * from the burdens and evils arising from the presence of aliens who are, or may become, vagrants, paupers, mendicants, criminals, etc., * * * and to impose con-

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ditions upon which such persons may reside in the state, and to provide the means and mode of their removal from the state upon failure or refusal to comply with such conditions."

Section 2 is the one which prohibits any corporation from employing, directly or indirectly, in any capacity, any Chinese or Mongolians; and section 3 provides that "no Chinese shall be employed on any state, municipal, or other work, except in punishment for crime." After providing for the removal from the state of all who "may become vagrants, paupers, etc.," it is difficult to conceive of any more effectual means, so far as they go, to reduce the Chinese to "vagrants, paupers, mendicants, and criminals," in order that they may be removed, than to forbid their employment, "directly or indirectly, in any capacity"—that is to say, to exclude them from engaging in useful labor. If it is competent for the state to enforce these provisions, it may also prohibit corporations from dealing with them in any capacity whatever—from purchasing from, or selling to them, any of the necessities of life, or any articles of trade and commerce.

In view of the vast extent of the field of labor and business now engrossed by corporations, to exclude the Chinese from all dealings with corporations is to reduce their means of avoiding vagrancy, pauperism, and mendicity to very narrow limits; and from the present temper of our people, and the number of bills now pending before the legislature tending to that end, there can be no doubt that, if the legislation now in question can be sustained, the means of *avoiding the condition of pauperism* denounced in the state constitution and laws would soon be reduced to the minimum. In the language of Deady, J., in *Baker v. Portland*, "admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home, and overriding the treaty-making power altogether." (5 Saw. 750.)

Vagrancy and pauperism, one would suppose, ought to be discouraged rather than induced by solemn constitutional mandates, requiring legislation necessarily lead-

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ing to such vices. Common experience, I think, would lead to the conclusion that the Chinese within the state, with equal opportunities, are as little likely to fall into vagrancy, pauperism, and mendicity, and thereby become a public charge, as any other class, native or foreign born. Industry and economy, by which the Chinese are able to labor cheaply, and still accumulate large amounts of money to send out of the country—the objection, perhaps, most frequently and strenuously urged against their presence—are not the legitimate parents of “vagrancy, pauperism, mendicity, and crime.” There are other objections to an unlimited immigration of that people, founded on distinctions of race, and differences in the character of their civilization, religion, and other habits, to my mind, of a far more weighty character. But these, unfortunately for those seeking to evade treaty stipulations and constitutional guarantees, can by no plausible misnomer be ranged under the police powers of the state.

Holding, as we do, that the constitutional and statutory provisions in question are void, for reasons already stated, we deem it proper again to call public attention to the fact, however unpleasant it may be to the very great majority of the citizens of California, that however undesirable, or even ultimately dangerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the state, but with the general government. The Chinese have a perfect right, under the stipulations of the treaty, to reside in the state, and enjoy all privileges, immunities, and exemptions that may there be enjoyed by the citizens and subjects of any other nation; and under the fourteenth amendment to the national constitution, the right to enjoy “life, liberty, and property,” and “the equal protection of the laws,” in the same degree and to the same extent as these rights are enjoyed by our own citizens; and in the language of Mr. Justice Bradley, in the *Slaughter-house cases*, “the whole power of the nation is pledged to sustain those rights.” To persist, on the part of the state, in legislation in direct violation of these treaty stipulations, and of the constitution of the United States, and in endeavoring to enforce

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such void legislation, is to waste efforts in a barren field, which, if expended in the proper direction, might produce valuable fruit; and, besides, it is little short of incipient rebellion.

In 1870 the Chinese at Tien-tsin, actuated by similar unfriendly feelings and repugnance toward foreigners of the Caucasian race, made a riotous attack upon the missionaries stationed at that place, killed some French and Russian citizens, and destroyed the buildings and property of French, Russian, and American residents. These powers promptly and energetically demanded satisfaction from the Chinese empire under their various treaties. The result was that fifteen Chinese were convicted and executed, and twenty others banished. The two magistrates having jurisdiction as heads of the city government were also banished for not taking effectual means to suppress the riot and protect the foreigners. The buildings of the American citizens were re-erected, and the property destroyed paid for, to the satisfaction of the parties suffering, and at the expense of the city. (Papers on Foreign Relations for 1871.) Thus, under the same treaty which guarantees the rights of Chinese subjects to reside and pursue all lawful occupations in California, the United States were prompt to demand satisfaction for injuries resulting to our citizens from infractions of the treaty by citizens of China. And the Chinese government promptly punished the guilty parties, and made ample satisfaction for the pecuniary losses sustained. It ought to be understood by the people of California, if it is not now, that the same measure of justice and satisfaction which our government demands and receives from the Chinese empire for injuries to our citizens resulting from infractions of the treaty must be meted out to the Chinese residents of California who sustain injuries resulting from infractions of the same treaty by our own citizens, or by other foreign subjects residing within our jurisdiction, and enjoying the protection of similar treaties, and of our laws. And it should not be forgotten that in case of destruction of, or damage to Chinese property by riotous or other unlawful proceedings, the city of San Francisco, like the more

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populous city of Tien-tsin, may be called upon to make good the loss.

In view of recent events transpiring in the city of San Francisco, in anticipation of the passage of the statute now in question, which have become a part of the public history of the times, I deem it not inappropriate in this connection to call attention to the fact, of which many are probably unaware, that the statutes of the United States are not without provisions, both of a civil and criminal nature, framed and designed expressly to give effect to, and enforce that provision of the fourteenth amendment to the national constitution, which guarantees to every "person"—which term, as we have seen, includes Chinese—"within the jurisdiction" of California, "the equal protection of the laws." Section 1979 of the R. S. provides a civil remedy for infractions of this amendment. It is as follows: "Every person who, under the color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or *other person* within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities, secured by the constitution and laws, shall be liable to the party injured, in an action at law, suit in equity, or other proper proceedings for redress."

Thus a remedy by action is given to any "person," against any other person who deprives him of "any right, privilege, or immunity," secured to him by the constitution, even if it is done "under color of any statute, ordinance, regulation, custom, or usage of the state." Possibly the prisoner might have been liable had he, in pursuance of the mandate of the statute in question, and on that ground discharged the Chinamen for whose employment he is now under arrest. But it is unnecessary to so determine now. At all events, he stood between two statutes, and he was bound to yield obedience to that which is superior.

Section 5510 makes a similar deprivation of rights under color of any statute, etc., a criminal offense, punishable by fine and imprisonment. And section 5519 provides that "if two or more persons in any state * * * conspire

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* * * for the purpose of depriving, either directly or indirectly, any person or class of persons, of the equal protection of the laws, or of equal privileges and immunities under the law, * * * each of such persons shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment." These provisions of the United States statutes, the supreme law of the land, are commended to the consideration of all persons who are disposed to go from place to place, and, by means of threats and intimidation, endeavor to compel employers to discharge peaceable and industrious Chinamen engaged in their service. There are other provisions, both civil and criminal, of a similar character, having the same end in view.

Only a few days since, the supreme court of the United States on *habeas corpus* sustained an indictment in *Ex parte Virginia*, against a county judge of Virginia, found under section 4 of the civil rights act of 1875 (18 Stat. 336), for failing to summon colored citizens as jurors, "on account of race and color." The court held this act to be constitutional and valid under the fourteenth amendment, and that it deprived colored citizens of the equal protection of the laws. (Since reported in 100 U. S. 339.) Thus it appears that congress, by the most stringent statutory provisions, has provided for the protection of all citizens and persons within the jurisdiction of the United States, in the full and complete enjoyment of the "equal protection of the laws," and of all "privileges and immunities guaranteed" by the fourteenth amendment in all their phases; and that the highest judicial tribunal of the nation has deemed it its duty to give such statutory provisions the fullest and most complete effect.

The result is that the prisoner is in custody in violation both of the constitution and laws of the United States, and of the treaty between the United States and the empire of China, and is entitled to be discharged; and it is so ordered.

GEORGE G. BERRY v. J. GINACA ET AL.

CIRCUIT COURT, DISTRICT OF NEVADA.

MARCH, 1880.

TOWN-SITE ACT CONSTRUED—EQUITY JURISDICTION.—Where Berry, who had entered land for a town site under section 2387, R. S., conveyed a portion of it to an occupant, and thereafter sued in equity to recover the price and to establish a vendor's lien therefor as against F., T. and D., who had purchased the same land at an execution sale: *Held*, that the complainant, Berry, had no vendor's lien, and that, having failed to establish a right to the equitable relief demanded, he could have no decree in equity for the purchase money.

Before SAWYER, Circuit Judge, and HILLYER, District Judge.

THE bill in this suit states that on December 1, 1874, the complainant sold to J. Ginaca and A. Gintz, jointly, certain real estate, describing it, for the sum of one thousand nine hundred and ninety-eight dollars and eighty cents; that no part of this has been paid, and that complainant has a lien as vendor upon the lands described for such unpaid purchase money; that Friend, Terry, and Doane claim some interest in the land which is subordinate to the vendor's lien. The prayer is for judgment against Ginaca and Gintz for the one thousand nine hundred and ninety-eight dollars and eighty cents with interest; for a decree subordinating the claim of Friend, Terry, and Doane to the complainant's vendor's lien; for a sale of the lands, etc. There is nothing in the bill to indicate that the sale by complainant was made in any other than his individual capacity. Ginaca and Gintz demurred; the demurrer was overruled and they were assigned to answer in ten days. Having failed to answer in that time, default was entered against them. The defendants, Friend, Terry, and Doane, answered, denying any sale from Berry to Ginaca and Gintz, or conveyance by him otherwise than as a town-site trustee, and setting up a purchase by them at sheriff's sale upon an alleged judgment obtained by them against Ginaca and Gintz by confession.

The laws of the United States (R. S., sec. 2387) authorize, in a given case, a county judge to enter at the proper land

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office land settled upon and occupied as a town site, "in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town and the proceeds of the sale thereof," to be regulated by the state legislature. The legislature of Nevada, after providing a mode of ascertaining the interests of the respective occupants, has required the trustee to convey by a good deed any parcel of the land to the person entitled according to the right as it existed at the time the entry was made. (2 Comp. L. Nev., sec. 3857.) After the patent has issued to the trustee from the United States he is required to make such deed to the person legally entitled "on payment of his * * * proper and due portion of the purchase money for said land," together with certain other allowances to the trustee for making the deed, acquiring the title, and administering the trust, "and the foregoing charge shall be full payment for all expenses attending the execution, except for revenue stamps." (Id., sec. 3862.) Any shares or parcels of the land not legally conveyed within a fixed time are to be sold to the highest bidder for the benefit of the town in the erection of public buildings, to which purpose the proceeds must be applied after paying the purchase money and expenses. (Id., sec. 3863.)

With these laws in force the plaintiff, Berry, in the year 1870, he then being district judge of Humboldt county, entered, in conformity therewith, six hundred and forty acres of land in trust for the several use and benefit of the inhabitants of the town of Winnemucca. After a contest with the Central Pacific Railroad Company, about a part of the land so entered, the plaintiff, about May, 1874, received a patent for two hundred acres as trustee for the inhabitants and occupants thereof, under the laws of the United States above set forth. When the time for payment came, before the patent issued, the plaintiff sought from the inhabitants of the town the money to pay for the land, but they declined to furnish it. He then, in a conversation with a few of the inhabitants, agreed to furnish the money himself if they, the inhabitants, would allow him to take the vacant and unoc-

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cupied lands within the limits of the quarter section, to which they assented. Ginaca at that time had a quartz mill on one of the quarter sections and agreed to furnish the money to pay for that quarter at the land office, and also to pay the plaintiff, as trustee, the town-site charges. Ginaca furnished four hundred dollars to enter the one hundred and sixty acres upon which his mill stood. Before the patent came, Ginaca became considerably indebted to the complainant, and asked him to let the four hundred dollars go into the general account, promising to pay for the land when the complainant should give him title. Six months later the complainant, as trustee under the laws aforesaid, deeded to Ginaca and Gintz ninety-nine and ninety-nine one hundredths acres, that being the portion of the quarter section to which there was no other claimant. At this time no purchase money was paid by Ginaca and Gintz other than the four hundred dollars as stated. The value of the land at town-site rates would be about thirty dollars an acre. The foregoing is the substance of the complainant's own version of the transaction.

George B. Berry, for complainant.

J. B. Marshall, for defendant.

By the Court, HILLYER, J. It appearing that the complainant took the legal title to these lands, as a trustee under the statute for the use and benefit of those legally entitled as occupants, the question is whether he can, under such circumstances, have a vendor's lien upon the land in dispute. We think it is clear that he can not. The authorities cited by complainant to show that a trustee may have a lien have no reference to a vendor's lien. They merely state the doctrine that in suits between trustee and *cestui que trust* if there is a fund under the control of the court, the costs as well as the charges and expenses of trustees, when properly incurred, constitute a lien on the trust fund or estate in favor of the trustee, and he will not be compelled to part with the legal title until his claim is discharged. (Hill on Trustees, 567.)

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In this case there is no fund in court, nor is the *cestui que trust* calling for the legal title. The trustee has long since conveyed the legal estate to him. Under the statute before so doing he has a right to demand from the occupant to whom the deed is made everything to which he is entitled. This includes the occupant's share of the purchase money paid to the United States for the land and some other expenses of administering the trust. It is only upon payment of all these that the occupant is entitled to demand a deed. Indeed, in most cases it would be an abuse of the trust to convey without prepayment of the grantee's share of the original purchase money, at least. At all events, there is nothing in the statute giving the trustee a lien if he sees fit to convey before he is paid.

A vendor's lien can exist only for unpaid purchase money, if we admit the trustee in this case may be called, properly, a trustee. It is a misapplication of terms to call the charges and expenses of a trustee in administering his trust, purchase money, when he deeds the legal estate to his *cestui que trust*, in execution of his duty as trustee. If the money paid to the United States is to be distinguished from the costs and charges, then that money Ginaca has paid. The testimony shows that before the cash entry was made by the plaintiff as trustee, he received from Ginaca four hundred dollars, to be applied to the payment of the land so entered, at the rate of two dollars and fifty cents per acre. The quantity actually conveyed by the plaintiff to Ginaca and Gintz was a fraction less than one hundred acres; so that the plaintiff in fact received from Ginaca, before entry of the land, more than the amount which can properly be called purchase money. Nor do we think the subsequent arrangement, if such there were, by which the four hundred dollars went into the general account between plaintiff and Ginaca can have the effect of reviving the lien, supposing it to have ever existed. Under the statute the purchase money is paid to the United States, which then conveys the town site to a trustee in trust for the benefit of the inhabitants. The United States is, properly speaking, the vendor, and the inhabitants the real purchaser. The trustee, whether

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judge or town authorities, is a mere channel for the title, with no beneficial interest in the land, made use of as a convenient mode of vesting the title in the occupants of the town site, according to their respective interests. His duties are prescribed by the law, and if he follows that law, no such claim as that made in this suit can ever exist.

Since the complainant has no lien to enforce, and the establishing and enforcing of that alone gives him any standing in a court of equity, can he now have a decree against the two defendants, Ginaca and Gintz, for the money alleged to be due from them, they having made default? It is true, as the plaintiff contends, that the defendants, Friend, Terry, and Doane, have no concern in this suit after the lien is defeated. But it may be a question of jurisdiction. Had the complainant filed a bill to recover money due from Ginaca and Gintz simply, his bill would have been dismissed, his remedy at law being plain and adequate. In such a case the suit would not be within the jurisdiction of a court of equity, and although default should be made the court would be without jurisdiction to make a decree. Jurisdiction of a subject-matter not properly of equitable cognizance can not be thus conferred. Consent of parties can not do it.

How is it when, as here, the plaintiff alleges in connection with his legal cause of action, some equitable matter which is not sustained by proof? Can he have a decree under such circumstances for the legal matter? "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." (R. S., sec. 723.) It is, also, an established rule, that where a court of equity has properly acquired jurisdiction over the subject for a necessary purpose, it is the duty of the court to proceed and do final and complete justice between the parties, where it can as well be done in that court as at law. (*Tyloe v. Insurance Co.*, 9 How. 405.) In the case last cited, after requiring a specific performance of an agreement to insure, the court went on (there having been a loss before the policy was delivered) and gave final relief on the policy. So, if a discovery is

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sought in aid of a claim purely legal, it may be obtained in a court of equity, which will afterwards go on and give the legal relief, and determine the whole matter in controversy. But in such case, if the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, "the established rules limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery without prejudice as to the legal cause of action." (*Russell v. Clark's Ex'r*, 7 Cranch, 89; Story Eq., sec. 74.) In the opinion of Mr. Justice Woodbury, it was stated that it was the design of our fathers in that clause of the judiciary act (now section 723, R. S.) not to permit proceedings to go on in chancery if it turned out in the progress of the inquiry that full and adequate relief could be had at law. (*Pierpont v. Fowle*, 2 Woodb. & M. 33.)

In *Graves v. Boston Ins. Co.*, 2 Cranch, 419, it appeared that Graves had taken insurance in his own name upon goods belonging to a partnership, while really intending to insure for the benefit of his firm. The suit was by the partnership to correct the alleged error in the policy, and to recover the insurance. The court denied the only equitable relief asked, viz., the correction of the alleged error in the policy, and concluded by saying that "as the remedy of the plaintiff Graves on the policy, to the extent of his own interest, is complete at law, the decree of the circuit court dismissing his bill must be affirmed. Now, in that case, if the plaintiff had obtained the equitable relief asked, the court of equity would have gone on and given full relief upon the reformed policy; but, the equitable relief being denied, nothing remained but a legal right capable of adequate redress at law, and the plaintiffs were dismissed to that forum. It being a question of power to make a decree, the fact that Ginaca and Gintz have made default can not give the court jurisdiction to decree in a case not of equitable cognizance. It seems to us clear that whenever no equitable relief is given, the plaintiff can have no standing in a court of equity; for, in such cases, the only ground upon which a court of equity proceeds to give legal relief

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is that the party was compelled to come to the court of equity, and ought not to be deprived of the legal remedy incidental to his equitable claim. When, therefore, the court determines that the plaintiff has no case for its equity side, it can do nothing, if it proceeds; except make a decree upon a legal matter. When the plaintiff's bill is dismissed as to his equitable matter, it amounts to an adjudication that he has an adequate remedy for his legal claim in a court of law, and, consequently, that he never should have come with his suit into a court of equity.

Bill dismissed without prejudice to the plaintiff's legal cause of action.

IRA CUTTING v. DAVID CUTTING ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 29, 1880.

1. GRANT TO CHILDREN UNDER SECTION 4 OF THE DONATION ACT.—Upon the death of a married settler under section 4 of the donation act (9 Stat. 497), before receiving a patent for the donation, and without having exercised the power to sell or devise the same, his interest therein is granted to his widow and children or heirs, and they take as the direct donees of the United States; and not by descent from such settler, and therefore the property can not be sold by the administrator to pay his debts.
2. CHILDREN.—The word children as used in section 4 of the donation act, includes grandchildren, so that the children of a deceased child are entitled by right of representation to a child's part in the donation acquired thereunder by their grandparents.
3. CHILDREN OR HEIRS.—The grant of the interest of a deceased settler in the donation to his "children or heirs," as provided in section 4 of the donation act, takes effect in favor of the children first and to the heirs only in default of children.
4. HEIRS OF A DECEASED SETTLER.—The heirs of a deceased settler, under section 4, are such persons as the local law—the law of Oregon—makes his heirs.
5. PATENT TO THE HEIRS OF A DECEASED SETTLER.—A patent to the heirs of a deceased settler, under said section 4, presupposes that it was found in the land department that such settlers left no children, and the contrary can not be shown to affect the patent in an action at law.

Before DEADY, District Judge.

THIS action is brought by the plaintiff, a citizen of California, against the defendants, David Cutting, Orin Cutting

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and G. J. Trullinger, citizens of Oregon, to recover the possession of an undivided one fifth of the north half of the donation of Charles Cutting and Abigail, his wife, the same being claims numbered 47 and 52 and parts of sections 5 and 6 in township 4 south, range 2 east, and sections 1 and 2 in township 5 south, of the same range, and situated in the county of Clackamas.

The defendants, David and Orin Cutting, deny the allegations of the complaint, and allege that they are the owners in fee of the premises except one hundred and sixteen acres thereof. The defendant, Trullinger, makes the like denials and alleges that he is such owner of the said one hundred and sixteen acres.

John H. Reed and Hugh T. Bingham, for the plaintiff.

W. Carey Johnson, for the defendants.

DEADY, J. By the stipulation of the parties, the case is submitted to the court upon an agreed state of facts, which is to stand and be taken for the special verdict of a jury. From this it appears that Charles Cutting settled upon the claims aforesaid on April 11, 1849, and on May 3, 1864, duly proved his residence and cultivation thereon as provided in the donation act of September 27, 1850 (9 Stat. 497), from June 20, 1850, until July 10, 1854; but did not then nor thereafter pay the fee required by law for the patent certificate, and died thereon intestate in the year 1868; that on February 28, 1870, upon the application of the administrator of said Charles Cutting, and upon the payment by him of the necessary fee therefor, a patent certificate for said donation was issued to said Abigail, the widow of said Charles Cutting, and to the "heirs at law" of the latter, the south half to said Abigail and the north half to said heirs; and that afterwards, on May 5, 1875, a patent was issued by the United States for said donation accordingly; that said Charles Cutting left surviving him, David, Charles, and Adelia, children, and also Ira, the plaintiff herein, and Emma, the children of his son A. J. Cutting, who died in the year 1855; that on April 4, 1869,

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said Emma was married, and that said Ira has duly acquired whatever interest said Emma had in said donation; that said Trullinger's title to said one hundred and sixteen acres consists in a conveyance to him of the same by the administrator aforesaid in pursuance of a sale by him upon the authority of an order of the county court of said county, to pay the debts of his intestate, and that the proceedings in which said order and sale were made were due and regular, except that said Emma was not served with any citation or process therein; and that the defendants' interest in the premises is, as alleged in their respective answers, unless the said Ira and Emma are entitled to an undivided one fifth thereof under the donation act aforesaid, and the facts herein stated, "as children or heirs at law of said Charles Cutting, deceased."

The questions of law which arise upon these facts depend principally for their solution upon the proper construction of that portion of section 4 of the donation act which provides (9 Stat. 497) that in all cases where the donees thereunder, being married persons, "have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon or since, and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon."

The same section also contains a proviso declaring "void" "all future contracts * * * for the sale of the land," to which any person "may be entitled under this act before he or they have received a patent therefor." But this proviso was repealed by section 2 of the act of July 17, 1855 (10 Stat. 306), with the following qualification: "Provided that no sale shall be deemed valid, unless the vendor shall have resided four years upon the land."

In *Barney v. Dolph*, 7 Otto, 652, Mr. Chief Justice Waite, speaking for the supreme court, held that this repeal of the prohibition to sell "was, under the circumstances, equiva-

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lent to an express grant of power to sell," after "the right to a patent had been fully secured;" and that such repeal did by a necessary implication, "in cases where sales were made," repeal the above provision in section 4, giving the interest of the settler in the donation in case of his death before patent to his devisee or wife and children or heirs, saying, "any provision in the act transferring the title of the settler, in case of his death before receiving the patent to his child, heir or devisee, is palpably inconsistent with an unlimited power to sell and convey the land. The two can not stand together, and consequently the power of sale, which was the latest enactment, must prevail."

This construction of the act, however, leaves the interest of the settler, who dies without a patent and without a sale, to go or pass as originally provided, to his wife and children, or heirs, or devisee, as the case may be.

In *Hall v. Russell* (101 U. S. 503), decided at the present term of the supreme court, Waite, C. J., speaking for the court, held that a settler upon the public lands under the donation act prior to the completion of the four years' residence and cultivation required by the act had only a possessory right thereto, that is, "a present right to occupy and maintain possession so as to acquire a complete right to the soil," and that such settler was not qualified to take as a grantee under the act "until he had completed his four years' of continued residence and cultivation," and performed "such other acts in the mean time as the statute required in order to protect his claim and keep it alive," such as giving "notice of the precise tract claimed" and proving "the commencement of the settlement and cultivation;" and that therefore a settler, dying before the completion of such residence and cultivation, had no estate in the land to dispose of by will or otherwise, but that under section 8 of the act his possessory right went to his heirs, who, upon making proof of the settlement and death of their ancestor, took the land, not from their ancestor, but as the grantees and donees of the United States.

Under these decisions, as well as others of this court, it is clear that the interest of Charles Cutting in this donation,

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whatever it was, terminated with his life, and that the land was not thereafter liable for his debts or subject to sale by his administrator, but thereupon became and was the absolute property of his wife and children as the direct donees and grantees of the United States. In other words, they took by purchase and not by descent. (*Fields v. Squires*, 1 Deady, 382; *Lamb v. Starr*, Id. 451.)

The power of sale or devise which the settler had upon the completion of his residence and cultivation was never exercised, and therefore the survivor and children became entitled to the premises as though such power had never existed.

Doubtless this power of sale ought to be construed to include the power to impose a charge or lien upon the premises, as by mortgage, which should bind the interest of the deceased in the donation to the extent of such lien as in the case of an outright sale. But in the case of a settler dying without a patent and leaving debts not secured upon his interest in the donation, the creditors have no claim upon the property as against the survivor and children, and therefore a sale by the administrator of the deceased settler is void.

Therefore the sale to Trullinger by Cutting's administrator gave the former no interest in the premises.

The next question to be considered is, can or ought the word "children" as used in this connection be construed to include grandchildren? It is admitted that ordinarily and properly the former term does not include the latter; but it has been so construed in the case of wills where it appeared from the context that such was the intention of the testator. (*Bouvier, verbum Children.*) A power to appoint an estate to the use of children has been held not to include grandchildren. But Chancellor Kent, while admitting this to be the settled rule in the construction of powers, does not hesitate to characterize it "as a very strict and harsh" one. (4 Kent, 345.)

The principal authority cited by the defendants upon this point is *Adams v. Law*, 17 How. 417. In this case the question arose upon the construction of marriage articles to

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secure a jointure to the intended wife. The articles provided that in case of the death of the husband before the wife, she should have the use of certain real property during her life, but in case of her death before his, "leaving issue of the said marriage one or more children then living" upon the death of the husband the property was to go "to the child or children of said marriage" in fee simple. The daughter and only child of this marriage intermarried with Lloyd N. Rogers, and died before her mother, leaving two children, who, upon the death of their grandparents, the grandmother dying first, claimed to be entitled to take under the articles as the representatives of their deceased mother.

The court below allowed the claim, but the supreme court held otherwise, saying, "the word 'issue' is a general term, which, if not qualified or explained, may be construed to include grandchildren as well as children. But the legal construction of the word 'children' accords with the popular signification, namely, as designating the immediate offspring;" but admitted that in the case of wills, where such appeared to have been the intention of the testator, grandchildren had been allowed to take under a devise "to my surviving children."

But the court was evidently influenced by the consideration that the principal object of the articles was to make a provision for the intended wife and not the issue of the marriage, and also that the children to whom the estate was limited upon the double contingency of the wife dying before the husband and their surviving them both, were "children then living," that is, at the death of the mother and the father.

But in *Walton v. Cotton*, 19 Id. 355, the court held that the word children in the act of congress of June 2, 1832, and the several acts supplemental thereto, granting arrearages of pensions to certain officers of the revolution, and in case of the death of any such officer before the date of the act, then to his widow, if there was one living, and if not, to his children, included the grandchildren of a deceased pensioner, whether their parents died before or after the

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death of such pensioner, and that they were entitled to take their share of such pension as the representatives of their deceased parent.

In the course of the opinion of the court, Mr. Justice McLean says: "Should the word children, as used in these statutes, be more restricted than when used in a will? In the construction of wills, unless there is something to control a different meaning, the word children is often held to mean grandchildren. There is no argument that can be drawn from human sympathy, to exclude grandchildren from the bounty, whether we look to the donors or the chief recipient. Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered. But to withhold any arrearage of this bounty from his grandchildren, who had the misfortune to be left orphans, and give it to his living children, on his decease, would not seem to be a fit discrimination of national gratitude. * * * Congress has not named grandchildren in the acts; but they are included in the equity of the statutes. And the argument that the pension is a gratuity, and was intended to be personal, will apply as well to grandchildren as to children. * * * On a deliberate consideration of the above statutes we have come to the conclusion that the word children, in the acts, embraces the grandchildren of the deceased pensioner, whether their parents died before or after his decease. And we think they are entitled, *per stirpes*, to a distributive share of the deceased parent."

This case is decidedly in point. The analogy between it and the case at bar is complete and instructive. The grant proffered by the donation act, particularly the fourth section thereof, was a bounty to the parents in consideration of the timely and important services rendered by them in the occupation and settlement of this country. And in case of the death of either of them without having received a patent for the donation, the "benign policy" of the act, was to secure this bounty, first to the immediate family of

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the deceased, his widow and "children," and for lack of the latter, to her and his "heirs" generally.

The children of the deceased child of Charles Cutting are certainly within the equity of the statute, more so even than were the grandchildren of the deceased pensioner. And there is nothing in the circumstances of the case, or the reason of the provision, which should exclude them, as the representatives of their parent, from participating in the bounty of the government.

Owing to his comparative age and ability, the deceased child may have largely shared with his father the journeyings, hardships, and labor which were involved in obtaining this donation, and in this respect may have been the most deserving of the family.

This is a beneficial statute—a measure of general utility and justice—particularly the clause under consideration, which provides for the disposition of the donation in case the settler dies before he has obtained a patent, and should therefore have a liberal and benign interpretation. (Smith's Com., sec. 480.) Such has been the spirit in which the act has been construed by the courts. Indeed, in *Silver v. Ladd*, 7 Wall. 224, the supreme court held that a single woman was included in the description of persons capable of receiving a donation under the fourth section. In delivering the opinion of the court, Mr. Justice Miller characterizes the act as "one of the most benevolent statutes of the government;" and particularly, in speaking of the construction of this fourth section, says: "Anything, therefore, which savors of narrowness or illiberality in defining the class, among those residing in the territory in those early days, and partaking of the hardships which the act was intended to reward, who shall be entitled to its benefits, is at variance with the manifest purpose of congress."

And, according to a celebrated collector of the curious and interesting events and customs of past ages, this question was the subject of a judicial combat in the German empire, in the tenth century, when the champion in behalf of the rights of the grandchildren proving victorious, "it was established by a perpetual decree that they should

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thenceforth share in the inheritance together with their uncles." (1 Disraeli's Curiosities of Literature, 233.)

It appears, then, that both upon reason and authority, ancient and modern, the word children, as used in the clause under consideration, was intended by congress to include all the children of the deceased settler, the living ones actually and *per capita*, and the deceased ones by their legal representatives and *per stirpes*. This being so, the plaintiff, as the representative of A. J. Cutting, a child of the deceased settler, and the grantee of his sister Emma Cutting, is entitled to an undivided one fifth of the north half of the donation.

But upon the face of the patent and the conveyance from his sister, it appears that the plaintiff is so entitled, without reference to the question whether he and she would be included in a grant to the "children" of Charles Cutting, deceased.

The patent grants the premises to the "heirs at law" of Charles Cutting, and ignores the right of the survivor, Abigail Cutting, altogether. In this respect it may be considered void upon its face, as it discloses the fact that there was a survivor to whom the act gave an equal part in the premises with an heir. (*Davenport v. Lamb*, 13 Wall. 428; *Lamb v. Starr*, 1 Deady, 358.)

The heirs, whoever they may be, can only take in default of children. The act substitutes them for children, in case there are none of the latter. (*Lamb v. Starr, supra*; 1 Red. on Wills, 486, 487.)

But whether the patent should issue to the children or heirs involved a question of fact, to be determined by the land department before it was issued. If the evidence showed that the deceased settler left no children, then the patent should have been issued to his heirs, but not otherwise. The patent having been issued to the heirs, the presumption is that there were no children. And although it appears from the agreed case that such is not the fact, yet this can not affect the patent, which may not be avoided at law, for matter *dehors* the record. (*Sharp v. Stephens, ante*, 48, and cases there cited.) In this case it was held that a

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patent could not be contradicted at law by showing that the wrong person was named therein as the wife of the settler and grantee of one half of the donation.

Who are the heirs of Charles Cutting is a matter to be determined solely by the local law, the law of Oregon. As was said by this court, in *Lamb v. Starr*, *supra*, "the donation act does not prescribe who shall be considered the heirs of a deceased settler, any more than it prescribes who shall be considered the wife of a settler. Both these are left to the local law, the law of Oregon. * * * Who would be entitled to claim as heir of the deceased would in all cases depend upon the law of Oregon at the time of the death; but persons claiming as children are, by the donation act, preferred to those claiming simply as heirs by the local law."

By the law of this state, at and before the death of Charles Cutting, his children, including "the issue of any deceased child by right of representation," were his heirs. (Or. Laws, p. 547.) The patent, being to the heirs for the north half of the donation, gives the plaintiff and his sister, as the issue of A. J. Cutting, an equal interest therein with the surviving children of the deceased settler. And the patent having given the premises to the heirs, without including the surviving widow, the interest of each heir would be an undivided one fourth. But, as has been said, this omission of the widow from the grant in this respect is shown upon the face of the patent to be erroneous, and may therefore be disregarded here. The plaintiff is entitled, upon the patent and the agreed case, to recover an undivided one fifth of the whole premises.

And upon this view of the matter, it may have been unnecessary to pass upon the question whether grandchildren are included in the word children or not.

But the argument of the case turned mainly upon this point, and counsel for the defendant was urgent that it should be decided, so as to avoid the expense and delay of further litigation.

As it is, the court, having determined that the grant to the children of the deceased settler, Cutting, included the

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children of his deceased son, A. J., the word "heirs" in the patent is practically the exact synonym of the word "children," as used in the statute; and although the patent should have been issued to the children, instead of the heirs, still the effect and operation given by it to the grant coincides with the true intent and meaning of the act.

On a rehearing of this case before Sawyer, circuit judge, and Deady, district judge, on April 15, 1880, the conclusion of the latter was affirmed, and the plaintiff had judgment accordingly.

THE UNITED STATES v. FRANK OSBORNE.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 8, 1880.

1. INDIAN.—When under charge of Indian agent, within the meaning of the law prohibiting the sale of spirituous liquors to him.
2. CITIZENSHIP.—Indians are not born subject to the jurisdiction of the United States, and are therefore not citizens thereof, or within the purview of the fifteenth amendment.
3. SAME.—The state of Oregon may make an Indian a voter, and the United States may make him a citizen, in which latter case, by the operation of the fifteenth amendment, he would become a voter of the state in which he resides, if otherwise qualified, according to its laws; but an Indian can not become a citizen himself, and without the consent, in some form, of the United States.
4. SAME.—The United States has not conferred citizenship upon Indians in Oregon.

Before DEADY, District Judge.

THIS is an information filed by the district attorney against Frank Osborne, charging him with having disposed of spirituous liquor to an Indian under the charge of an Indian agent, contrary to section 2139 of the R. S.

The defendant pleaded not guilty, and submitted to be tried by the court without the intervention of a jury.

Rufus Mallory, for the United States.

The defendant, in propria persona.

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DEADY, J. The evidence, in which there is no conflict, proves that the Indian in question belongs to one of the tribes on the Warm Spring reservation, under charge of Indian agent Captain John Smith; that with the consent of the agent and his mother he has lived off the agency with Mr. Miller, near Eugene, in this state, for the past eight or ten years as a domestic, and was therefore commonly called "Joe Miller;" that within a few months since he left the house of Mr. Miller, and has been working in the neighborhood for some of the farmers, and occasionally making his home with an Indian living in the vicinity, upon a portion of the public land under the homestead act, and called Indian Jim; that this Indian belongs to one of the coast reservations, but has not resided there for some fifteen years, and claims to be a citizen and voter of Oregon; that a short time since, and after Joe had left the Millers, he went to Eugene, a few miles distant from his former residence, and asked the defendant, who kept a drug store there, for a pint of alcohol.

The defendant knew the Miller family, and Joe, as an Indian who lived with them and bore their name, and when Joe asked for the alcohol he asked him if he was Miller's boy, and Joe answered yes; whereupon he sold him the liquor. Agent Smith has known of the whereabouts of this Indian Joe since he left the reservation, and claims the right to return him there whenever he thinks proper; and his mother is still living there.

Upon these facts and the authority of *U. S. v. Holliday*, 3 Wall. 418, there can be no doubt that Joe is an Indian under charge of an agent appointed by the United States. In this case the Indian to whom the liquor was disposed lived upon a piece of land which he occupied in severalty, and voted at the elections as he was authorized to do by the laws of the state of Michigan.

There appears to be an impression that Indians, situated as Jim and Joe are, that is, who live off the reservation and among and more or less after the manner of white people, are citizens and voters of the state, and therefore it is no crime to give them spirituous liquors. But this is a mis-

take. The Indians are not a portion of the political community called the "people of the United States." And although not foreign nations or persons, they have always been regarded and treated as distinct and independent political communities. (*Worcester v. The State of Georgia*, 6 Pet. 515; *The Cherokee Nation v. The State of Georgia*, 5 Id. 1.)

What effect, if any, the act of March 3, 1871 (16 Stat. 566; R. S., sec. 2079), which declares that no Indian tribe within the territory of the United States "shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty," may have upon this question, it is not necessary now to consider. Probably none, as in effect it is only a declaration that thereafter the United States will not contract with the Indian tribes, but will regulate its relations with them and their affairs by law—by act of congress rather than the treaty-making power. And whether, and how far, congress can thus limit the constitutional power of the president "by and with the advice and consent of the senate to make treaties" (Const. U. S., art. II., sec. 2) is another question of a more serious character.

The constitution of this state limits the privilege of suffrage to "white males." (Const. Or., art. II., sec. 2.) But by the operation of the fourteenth and fifteenth amendments this word "white" is in effect stricken out of the constitution of the state. The fourteenth one provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside;" and the fifteenth one declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude." The result is that citizens of the United States can not be excluded from the polls on account of color. Therefore negroes, born in the United States, being born "subject to the jurisdiction" thereof, became citizens and voters.

But the Indian tribes in the United States, or the members thereof, are not born "subject to the jurisdiction" of

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the United States. (*McKay v. Campbell*, 2 Saw. 132.) There are no Indians in Oregon that were born subject to its jurisdiction, or that have since become so. In the report of the senate judiciary committee, made by Mr. Carpenter, December 14, 1870, it was stated, that the Indian tribes or the members thereof, are not subject to the jurisdiction of the United States, and therefore such Indians are not made citizens by the fourteenth amendment. (1 Dill. 348, note.)

The state may make any Indian a voter, or the United States may make him a citizen, and then by operation of the fifteenth amendment he becomes a voter within the state where he resides, if he is otherwise qualified, according to its laws. By the treaty of January 31, 1855 (10 Stat. 1157), the tribal organization and relation of the Wyandotte Indians, in Kansas, with the United States, was dissolved and terminated, and they were made "citizens of the United States to all intents and purposes."

But an Indian can not make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege, which no one not born to, can assume without its consent in some form. The Indians in Oregon not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.

It follows, as a matter of course, that the defendant in disposing of spirituous liquors to the Indian Joe, when and as he did, was guilty of a violation of the statute. But as it appears probable that the act of the defendant was the result of carelessness or a misapprehension of the *status* of the Indian Joe, rather than any guilty purpose to violate the law, I think it is a proper case for a mere nominal punishment. The defendant is therefore sentenced to pay a fine of one dollar.

IN RE AH LEE, ON HABEAS CORPUS.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 19, 1880.

1. **IMPRISONMENT.**—The national courts have jurisdiction to relieve any person from imprisonment, under color of the authority of a state without due process of law, contrary to the fourteenth amendment.
2. **DUE PROCESS OF LAW.**—A person imprisoned under a valid law, although there is error in the proceeding resulting in the commitment, is not imprisoned without due process of law, contrary to the fourteenth amendment.
3. **DE FACTO OFFICER.**—A person in office by color of right is an officer *de facto*, and his acts, as such, are valid and binding as to third persons; and an unconstitutional act is sufficient to give such color to an appointment to office thereunder.
4. **SAME.**—The constitution of Oregon authorizes the legislature, when the population of the state equals two hundred thousand, to provide by election for separate judges of the supreme and circuit courts. On October 17, 1878, the legislature passed an act providing for the election of such judges at the general election in June, 1880, and also that the governor should appoint such judges in the mean time, which was done: *Held*, that admitting such act was unconstitutional, because the population of the state was less than two hundred thousand, and that the appointments by the governor were therefore invalid, and also because the constitution only authorized the selection of such judges by election, still the persons so appointed under the act, and performing the duties of the judges of said courts were judges *de facto*, and a person imprisoned under a judgment given in one of them, convicting him of a crime is not thereby deprived of his liberty without due process of law, contrary to the fourteenth amendment.

Before DEADY, District Judge.

Rufus Mallory and John W. Whalley, for the petitioner.

DEADY, J. This is a petition for a writ of *habeas corpus* directed to the sheriff of this county, commanding him to produce the body of the petitioner, Ah Lee, before this court, together with the cause of his detention.

Substantially the petition states that the petitioner is a citizen of the empire of China; that he has been indicted and convicted of the crime of murder in the circuit court for the county of Multnomah, and state of Oregon, alleged to have been committed in the killing of one Chung Su Ging about

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October 3, 1878, in a joss house in this city, the judgment of which court was afterwards affirmed by the supreme court of the state; that afterwards said circuit court, in pursuance of a mandate from said supreme court, appointed April 20, 1880, as the day on which the judgment aforesaid should be executed, by hanging the petitioner; that neither the person who acted as judge of said circuit court during the pendency of said proceeding nor those who acted as judges of said supreme court during the same, were ever appointed or elected judges of said courts, or any of them in pursuance of any law or authority of the state of Oregon; that neither they, nor any of them, had any power or authority to act as such judges during the pendency of said proceeding, or at all, and that, therefore, said proceeding, and the judgment therein, were carried on and had without due process of law, within the meaning of article XIV of the amendments of the constitution of the United States, and are therefore void and of no effect; that the sheriff of said county now unlawfully restrains the petitioner of his liberty in pursuance of said void and pretended judgment, and also threatens and intends to deprive him of his life as therein provided and directed.

Besides these allegations contained in the petition, it was assumed, and understood upon the argument, that the following facts were judicially known to the court: That on October 17, 1878, the legislature of this state passed an act, entitled, "an act to provide for the election of supreme and circuit judges in distinct classes" (Ses. Laws, p. 33), by which it was provided, that at the general election in June, 1880, there should be elected three justices of the supreme court, who should take office on the first Monday in July thereafter; and also a circuit judge in each of the judicial districts of the state, who should take office at the same date. By section 10 of the act, it was further provided that, "within twenty days after the taking effect of this act, the governor shall appoint three judges of the supreme court and five judges of the circuit courts, who shall, within ten days after receiving notice of their appointments, qualify and enter upon the duties of their offices until their

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successors are elected and qualified as provided in this act;" that the governor appointed certain persons to be judges of the supreme and circuit courts, accordingly, who entered upon these respective offices and thereby displaced the five justices of the supreme and circuit courts then in office; and that each of the judges before whom the action against the petitioner was heard and tried, entered and held office, under and by virtue of an appointment under said section 10, and not otherwise; and the contention of the petitioner is, that this act is unconstitutional, and the appointments thereunder illegal and void, and therefore the petitioner is in custody without due process of law.

The petition is based upon the clause of section 1 of the fourteenth amendment, which reads, "nor shall any state deprive any person of life, liberty, or property, without due process of law," and sections 751-755 of the R. S., which provide for the issuing of the writ of *habeas corpus* by the courts and judges of the United States.

The seven hundred and fifty-third section of the R. S. provides that among other cases the writ may "extend to a prisoner" who "is in custody in violation of the constitution or of a law or treaty of the United States," whether under color of the authority of the United States or a state thereof.

This amendment, like the original constitution, is the supreme law of the land, and therefore within the limit of its operation. The national government is superior to that of the state. Section 5 of the amendment gives congress express power to enforce the provisions thereof.

In relation to the limitation upon the power of the state to "deprive any person of life, liberty, or property," congress has exercised this power in the passage of the act of February 5, 1867 (14 Stat. 385; R. S., sec. 753), which authorizes the national courts to inquire by *habeas corpus* into the cause of detention of any one who "is in custody," whether under the authority of the state, or otherwise, "in violation of the constitution, or a law or treaty of the United States," and to discharge him therefrom in case he is held in contravention thereof.

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If, then, the petitioner is restrained of his liberty or adjudged to lose his life, by the act or agency of the state, without due process of law, he is so restrained or adjudged in violation of the constitution of the United States, and therefore this court has power, and it is its duty to interfere and relieve him from such restraint or adjudication.

Argument can not make the case plainer than the mere statement of it. The conclusion necessarily follows from the premise. The state can only act through individuals, and when it does so, their acts are the acts of the state. As was said by Mr. Justice Strong in delivering the opinion of the court in *Ex parte Virginia* (100 U. S. 346), at the present term of the supreme court:

“ We have said that the prohibitions of the fourteenth amendment are addressed to the states. They are: ‘no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.’ They have reference to the actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislature, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean, that no agency of the state, or of the officers or agents by whom its powers are exercised, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a state government deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state’s power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or evade it.”

And again, in speaking of the power of congress to enforce these prohibitions, and the supposed want of it in regard to

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the injunctions addressed to the states in the original constitution, as was said in *Kentucky v. Dennison*, 24 How. 66: "But the constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the fourteenth amendment. It is but a limited authority, true, extending only to a single class of cases, but within its limits it is complete."

In re Parrott, ante, 349, Sawyer and Hoffman, JJ., lately held that the constitution and laws of California, forbidding the employment of Chinese by corporations, was a denial by the state of the equal protection of the laws to the Chinese, and therefore void, and took Parrott upon a *habeas corpus* out of the hands of the state authorities, where he was held upon a criminal charge for violating these laws, and discharged him as being in custody contrary to the constitution of the United States. (See, also, *Re Wong Yung Quy*, ante, 237.)

It is admitted that the state has the power to deprive persons of life, liberty, and property, provided it is not done without due process of law. The power to do this, so far as it ever existed, is denied to and in effect taken away from the state by the fourteenth amendment. And this is not all. In case the state does so deprive any one, or attempts to, power is conferred upon the general government to interfere and prevent or correct the wrong.

It is worse than idle to talk about the right of a state to do what the constitution prohibits it from doing, or the want of right in the United States to do what the constitution expressly authorizes it to do. The constitution, and not the local convenience, passion, or interest, is the standard and measure of the relative right and power of a state and the United States in our form of government.

This fourteenth amendment was made a part of the constitution by the ratification of the states, including Oregon, and its provisions are as much the supreme law of the land as any line or word in the original instrument.

The clause now under consideration only forbids a state to act towards individuals in disregard of what are generally deemed fundamental principles. So far, then, it is a bulwark against local tyranny and oppression, and there-

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fore ought to be considered and enforced as a provision intended and calculated to maintain and promote right and justice between the state and its inhabitants.

Article VIII of the constitution of the state provides substantially as follows: The judicial power shall be vested in a supreme circuit and county courts. (Sec. 1.) The supreme court shall consist of four justices, "to be chosen in districts by the electors thereof," but the number may be increased to seven. (Sec. 2.) Vacancies in this office must be filled by election, but the governor may fill a vacancy until the next election. (Sec. 4.) The supreme court shall have only appellate jurisdiction, and shall hold a term at the seat of government annually. (Secs. 6, 7.) The circuit court shall be held in each county by one of the justices of the supreme court; and shall have all judicial power not otherwise vested. (Secs. 8, 9.) Section 10 provides: "When the white population of the state shall amount to two hundred thousand, the legislative assembly may provide for the election of supreme and circuit judges in distinct classes, one of which classes shall consist of three justices of the supreme court, who shall not perform circuit duty, and the other shall consist of the necessary number of circuit judges, who shall hold full terms without allotment, and who shall take the same oath as the supreme judges."

The petitioner claims that the act under which the persons who were appointed judges of the court in which his case was tried and heard was unconstitutional and void, because: 1. The act does not declare or find that there was two hundred thousand population in the state when it was passed, nor was there any census, election return, or other record or public writing or record tending to establish that fact, but the contrary; 2. That the provision of the constitution authorizing the legislature to provide for distinct judges for the supreme and circuit courts, authorized it to do so by election, but not appointment, and therefore, at least section 10 of said act, the one under which these persons were appointed judges, is unconstitutional and void; and, 3. The subject of appointing judges is not expressed in the title, and therefore it is so far void as being passed

contrary to section 20 of article IV of the constitution, which provides: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title," and declares, that as to any subject not so expressed the act shall be void; and that, therefore, the persons appointed under said act as judges, were not judges but intruders and usurpers, and the petitioner is in custody and adjudged to die without due process of law.

What is due process of law or the want of it, under the fourteenth amendment, may, in some cases, be a difficult question to answer. The power conferred upon the United States to relieve against the acts of the state on this account was not intended to reach mere errors or defects in a proceeding, but only extends to cases in which there has been a palpable and substantial disregard of the law applicable thereto.

For instance, the constitution of this state (art. I., sec. 11) guarantees to a defendant in a criminal action the right of trial by jury. Now, if the legislature should provide that a certain person or class of persons who were obnoxious to the public should be tried without a jury, there can be no doubt that a conviction under such an act would be without due process of law, and the party affected by it might be relieved from it by the power of the United States.

Chancellor Kent in his commentaries (vol. 1, p. 612) says: "The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice."

Since the adoption of the fourteenth amendment two cases have been before the supreme court of the United States involving this question. The first was *Kennard v. Louisiana*, 2 Otto, 481. There was a contest between Kennard and Morgan for a state judgeship in Louisiana, and the plaintiff in error appealed from the decision of the supreme court of the state giving the office to Morgan, on the ground that it was without due process of law.

The chief justice, in announcing the decision of the court, said that the only question in the case for its consideration was, whether the state of Louisiana, acting through

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her judiciary, had deprived Kennard of his office without due process of law, and then said: "It is substantially admitted by counsel in the argument that such is not the case, if it has been done 'in the due course of legal proceedings,' according to those rules and forms which have been established for the protection of private rights. We accept this as a sufficient definition of the term 'due process of law,' for the purposes of the present case. The question before us is not, whether the court below, having jurisdiction of the case, and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts to proceed at all."

The judgment of the state court was affirmed.

The second was *Pennoyer v. Neff*, 5 Otto, 723. This case went up from this court, and the question was as to the validity of a personal judgment given against a non-resident of the state in a court of the state without any service of the summons except by publication.

In delivering the opinion of the court, Mr. Justice Field said: "Since the adoption of the fourteenth amendment to the federal constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted on the ground that proceedings in a court of justice, to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the

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suit, and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance."

In considering this case, I have not found it necessary to pass upon the constitutionality of the act of October 17, 1878, or the validity of the appointments thereunder. For although the act may be unconstitutional, and the appointments illegal, still if the persons appointed were judges *de facto*, their acts, as to third persons, are valid, and the petitioner is not restrained without due process of law.

From the provisions of the constitution above cited, it plainly appears that the supreme and circuit courts of the state are created by the constitution. They exist by virtue of its provisions. As therein provided, the judges of the former are the judges of the latter, until the legislature in the exercise of the power conferred upon it by section 10 of article VII., provides for the election of distinct judges for the latter.

The persons appointed as judges under this act, although its unconstitutionality be admitted, and that therefore they are not judges *de jure*, or of right, are nevertheless acting as judges of constitutionally created and existing courts, having jurisdiction to try, hear, and determine the criminal action in which the petitioner has been convicted of murder and sentenced to receive the punishment of death when and as it took place, both in the court below and upon appeal.

A person actually in office by color of right or title—not a mere usurper or intruder—although not legally appointed or elected thereto, or qualified to hold the same, is still an officer *de facto*, or in fact, and, as a matter of public convenience and utility, his acts while so in office are held valid and binding as to third persons.

But counsel for the petitioner contend: 1. That no one is an officer *de facto* who enters upon or holds an office under a void law or illegal appointment, but that he is only an intruder; 2. That to make one an officer *de facto* he must appear to have entered upon the office under a legal

election or appointment—under color of right; 3. That a person cannot be considered an officer *de facto* unless the office he is said to be in, legally exists; and there being no such office as “circuit judge,” or judge of the circuit court established by the constitution, the person who acted as judge on the trial of the petitioner in the court below was not even a *de facto* judge; and, 4. That an appointment cannot give color of right to enter and hold an office which is elective and *vice versa*, and therefore the person who acted as judge of the circuit court in which the petition was tried was not a judge *de facto*.

Upon the latter point counsel cite *People v. Kelsey*, 34 Cal. 475; *People v. Albertson*, 8 How. Pr. 363; *Brown v. Blake*, 49 Barb. 9. In the first of these cases the court held that the constitution of the state having made the office of tax collector elective, the legislature had no power to provide for its being filled by appointment, nor to confer the duties thereof upon an office filled by appointment. But there the question arose in a direct proceeding to try the right to an office, while here it arises in a collateral one to determine the legality of an act done by a person while in office. Upon the question of the power of the governor to appoint a judge when the constitution only provides for his election, it is in point. But it has no bearing upon the question whether a person so appointed is a judge *de facto* or not.

The second case is a direct authority for the proposition, that “an officer *de facto*, is one who acts under color of title, which color can only be given by power having authority to fill the office,” in other words, that an appointment to an elective office does not give color of title to the appointee, and *vice versa*.

The opinion is plausible; but no authorities are cited, and so far as appears the distinction attempted to be made by it is not found in the books. The case was decided in the county court, and the opinion delivered by the county judge. The last case also held that the legislature could not fill an elective office by appointment so as to give the incumbent color of right and make him an officer *de*

facto, and therefore it discharged a party on *habeas corpus* from arrest, where the warrant was issued by a police judge, elected by the trustees of a village, who were themselves appointed to office when the constitution provided for their election. The opinion given by the judge who heard the matter at the special term cites no authorities, and it was affirmed at the general term without an opinion.

As to the third point, it is sufficient to say that the constitution in effect creates a circuit court in each county, to be held by a justice of the supreme court or a circuit judge, as the case may be, and such court is the office of the judge who holds it. A circuit judge's office is the circuit court in which he sits, the place which he fills, and such is the place or office filled by the person who acted as judge upon the trial of the petitioner.

The first and second points cover the general question, What constitutes a person an officer *de facto*? In *The King v. The Corporation of the Bedford Level*, 6 East, 356, Lord Ellenborough, citing 1 *Ld. Raym.* 660, said: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."

In this case it was held that a deputy registrar who continued to perform the duties of registrar after the death of his principal, was not registrar *de facto*, because he entered only as deputy and could not therefore acquire the reputation of registrar.

In *Wilcox v. Smith*, 5 *Wend.* 232, it was held that a person who had acted as justice of the peace for three years with the reputation of being such justice, was presumably in office under color of an election, and therefore an officer *de facto*, although there was no direct evidence that he entered the office under color of an election.

In delivering the opinion of the court, Sutherland, J., said: "The principle is well settled, that the acts of officers *de facto* are as valid and effectual when they concern the public or the rights of third persons as though they were officers *de jure*. The affairs of society can not be carried on upon any other principle. * * * It will be ob-

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served that the cases do not go upon the ground that the claim by an individual to be a public officer, and his acting as such, is merely *prima facie* evidence that he is an officer *de jure*, but the principle they establish is this: that an individual coming into office by color of an election or appointment, is an officer *de facto*, and his acts in relation to the public or third persons are valid until he is removed, although it be conceded that his election or appointment was illegal. His title shall not be inquired into. The mere claim to be a public officer, and the performance of a single or even a number of acts in that character, would not perhaps constitute an individual an officer *de facto*. There must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment."

In *People v. White*, 24 Wend. 539, Mr. Chancellor Walworth said: "An officer *de facto* is one who comes into a legal and constitutional office by color of a legal appointment or election to that office; and as the duties of the office must be discharged by some one for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed, before they submit themselves to his authority, or call upon him to perform official acts which it is necessary should be performed. Thus, for instance, the constitution requires that the justices of the supreme court shall be appointed by the governor, with the advice and consent of the senate; but if, either intentionally or from inadvertence, the governor should appoint and commission an individual as one of the justices of that court, without having previously nominated him to the senate and obtained the consent of that body, and the person thus appointed should take upon himself the duties of that office, he would be a judge of the supreme court *de facto*; although upon a *quo warranto* he might be removed from the office to which he had not been legally and constitutionally appointed; and his official acts while he was such judge *de facto*, would be valid as to third persons; so that this court, upon a writ of error

brought for the purpose of reversing a judgment pronounced by him, as such judge *de facto* of that court, would not be authorized to inquire as to the validity of his appointment. The result would be the same when his appointment had been made with the consent of the senate, in case he was constitutionally ineligible in consequence of his being a minister of the gospel."

To the same effect are the cases of *People v. Collins*, 7 Johns. 549; *McInstry v. Tunner*, 9 Id. 135. In the latter a person in the office of justice of the peace was held to be an officer *de facto*, although he was a minister of the gospel, and therefore constitutionally ineligible.

In *Mullet v. Uncle Sam etc.*, 1 Nev. 188, it was held that a person acting as justice of the peace, under an appointment by selectmen, who had no authority to make such appointment, and a commission from the governor, who was authorized to issue commissions to such officers, was a justice *de facto*.

In February, 1812, the legislature of Massachusetts created the county of Hampden, and provided that the act should not take effect until August. In the mean time, the governor of the state assumed to appoint the officers for the new county, as he was authorized to do after the law took effect. The matter came before the court, and it was held that the appointments were void, as being made without law, but that the appointees, while in office, were officers *de facto*, and their acts valid. (See *Fowler v. Belev*, 9 Mass. 231; *Commonwealth v. Fowler*, 10 Id. 290.)

In *Plymouth v. Painter*, 71 Conn. 587, it was held that an officer *de facto* is one who executes the duties of an office under color of an appointment or election to that office. He differs on the one hand from a mere usurper of an office who undertakes to act as an officer without any color of right, and on the other from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office.

In *Brown v. O'Connell*, 36 Conn. 451, an officer *de facto* was defined to be "one who has the color of right or title to the office he exercises; one who has the apparent title of an

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officer *de jure*," and in *Brown v. Lunt*, 37 Maine, 428, as, "one who actually performs the duty of an office, with apparent right and under claim and color of an appointment or an election."

Ex parte Strang, 21 Ohio St. 610, is a case directly in point and decides expressly what some of the foregoing cases do by necessary implication, that an unconstitutional act will give color of right to an appointment made under it. The case was this. A statute authorized the mayor of Cincinnati in the absence or disability of the police judge, to appoint a temporary substitute. In pursuance of this authority the mayor made such an appointment, who, in the discharge of the duties of the office, committed Strang to prison for the non-payment of a fine. The prisoner sued out a *habeas corpus*, and on the argument it was claimed in his behalf that the statute was contrary to the constitution, and void.

The court held, that admitting the act to be void, yet the appointee of the mayor was a judge *de facto*, saying: "The direct question in this case is, whether the reputed or colorable authority required to constitute an officer *de facto* can be derived from an unconstitutional statute. The claim that it can not seems to be based upon the idea that such authority can only emanate from a person or body legally competent to invest the officer with a good title to the office. We do not understand the principle to be so limited. We find no authorities maintaining such limitation, while we find a number holding the contrary. (9 Mass. 231; 10 Id. 290.) The true doctrine seems to be, that it is sufficient if the officer holds the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the constitution, will give such color."

In support of this conclusion the court cites *Taylor v. Skrine*, 3 Brev. 516; *Brown v. O'Connell*, 36 Conn. 432; *The State ex rel. v. Messmore*, 14 Wis. 164; *The State v. Bloom*, 17 Id. 521; in all of which it appears that an unconstitutional statute was held sufficient to give color of right or authority to an appointment to a judicial office, and the

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acts of such appointees, while in office thereunder, were held valid.

No decision of the supreme court of this state upon the question has been cited, and I am not advised that any exists.

Thus it will be seen, that the almost unbroken current of authority is against the claim made for the petitioner, that no one can be an officer *de facto* under a void law, or an illegal appointment; and admitting that the judges who tried and heard the action against the petitioner in the state courts were appointed judges of those courts under an unconstitutional act, yet they were at the least such judges under color of right and authority, and therefore they were and are judges *de facto*, and their acts are valid and binding as to third persons.

Color of title to an office is analogous to color of title to land. The latter does not mean a good title, or even a defective conveyance from one having title, but only the appearance of title, that is, a deed to the premises in due form of law. (*Stark v. Starr*, 1 Saw. 20.)

In conclusion, it appearing that the petitioner has been convicted of the offense charged against him in a court having jurisdiction of the subject-matter and the person, held, by at least a *de facto* judge, he is not, so far as this court can inquire, restrained of his liberty or adjudged to lose his life without due process of law, and therefore the petition for the writ is denied.

JOHN LLOYD, ASSIGNEE, ETC., v. D. J. FOLEY.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MAY 3, 1880.

VOID SALE—CHANGE OF POSSESSION.—A sale which was objected to as void against creditors under the laws of this state, because not accompanied by an actual, immediate, and continued change of possession, sustained in a suit by an assignee in bankruptcy on the authority of *Stewart v. Platt*, 101 U. S. 731.

Before HOFFMAN, District Judge.

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R. Thompson, for the plaintiff.

H. C. Hyde, for the defendant.

HOFFMAN, J. I am inclined to think that the delivery and change of possession of the property sold to the defendant in this case was sufficient to satisfy the requirements of section 3440 of the civil code of California. But under a recent decision of the supreme court of the United States the inquiry is immaterial. It had been supposed by this court and the circuit court that the sale or mortgage of a chattel under circumstances which rendered the transaction void as against creditors was also void as against the assignee in bankruptcy who represents the creditors. It was considered that any other rule would be unjust to the latter, for the property sold or mortgaged was by the terms of the statute subject to their demands, and could have been attached or levied on in execution. The bankruptcy prevented all proceedings on their part, and it seemed to follow, as a necessary consequence, that these rights could be asserted through the assignee for the equal benefit of all.

It is to be feared that the recent decision of the supreme court will, or would, if the bankrupt act were still in force, open a wide door to the frauds the statute was designed to prevent. Actual fraud, want of consideration, secret trust for the benefit of the vendor, etc., can rarely be shown. The statute wisely declares that the absence of an actual, immediate, and continued change of possession shall be conclusive evidence of fraud, and shall avoid the transaction as against creditors, subsequent purchasers, etc.

The bankruptcy deprives the creditors of the right conferred by the state statute to pursue the property in the hands of the vendee or mortgagee, and the bankrupt, although in the notorious and exclusive possession of the goods, has only to produce or procure some friend to produce a bill of sale or mortgage valid on its face as between the parties, to secure the withdrawal of, it may be, his entire assets from the assignee, unless the latter is able to

show fraud in fact. The whole object of the statute is thus defeated.

The case to which I have referred is *Stewart v. Platt, assignee*, reported in the *Chicago Legal News*, February 28, 1880. By the laws of New York every mortgage of chattels not accompanied by an immediate delivery, and followed by an actual and continued change of possession, is declared absolutely void as against creditors of the mortgagor and subsequent purchasers in good faith, unless the mortgage shall be filed as directed in the act. The supreme court held that the mortgage had not been filed as required by the act. It was therefore void as against creditors; and the decree of the circuit court, which directed the proceeds to be first applied in satisfaction of the claims of those creditors who had obtained judgments and sued out executions prior to the commencement of the bankruptcy proceedings, was affirmed. The circuit court had further directed that the balance of the proceeds should be paid to the assignee for the purposes of the trust.

This part of the decree was reversed by the supreme court. It held that the mortgage was valid as between the parties; that "the assignee took the property subject to such equities, liens, or incumbrances as would have affected it, had no adjudication in bankruptcy been made. While the rights of creditors whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter, representing general creditors, can not dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagor. The assignee can assert in behalf of the general creditors no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagee and the mortgagors the chattel mortgages were and are unimpeachable for

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fraud, or upon any other ground recognized in the bankrupt law."

An unrecorded chattel mortgage and a bill of sale, when each is unaccompanied by an immediate and continued change of possession, are in the same predicament, and if the assignee can assert no rights against the mortgagee in the one case, he can assert none against the vendee in the other.

It results in the case at bar, that even if the delivery of the property sold to the defendant was not accompanied by an actual and immediate delivery as required by law, the assignee can maintain no claim founded on that circumstance.

Judgment for defendant.

THE MARY ZEPHYR.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

MAY 19, 1880.

PAYMENT ALLOWED OUT OF SURPLUS PROCEEDS in the registry of a claim, which, by the law of this state, constituted a lien on the vessel.

Before HOFFMAN, District Judge.

James McCabe, proctor for the libelant.

M. Cooney and Sullivan & Craig, proctors for the claimant.

HOFFMAN, J. It can not be disputed that the petitioner, to establish his right to be paid out of the surplus proceeds remaining in the registry, must show, not merely that his co-owner is indebted to him, but that he had a lien upon the vessel for the debt. This court can not, in an admiralty suit, exercise the functions of a court of bankruptcy, and distribute the surplus proceeds of the vessel sold under its decree among the general creditors of the owner. But the privilege, or *jus in re*, which the court in such cases will recognize and enforce, need not necessarily be a maritime lien, or a lien on which an original suit in the admiralty

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court could be brought. Thus a mortgagee, though his rights could not be enforced by a libel to foreclose, may nevertheless claim and receive as against the mortgagor the remnants and surplus in the registry, and apply them in satisfaction of his mortgage. In like manner the lien of an attaching creditor will be respected after the satisfaction of maritime liens entitled to priority. (See *The Mary Anne*, Ware, 104.) If, therefore, the petitioner can show that he had a lien on the vessel for the amount of his advances at the time of her seizure, he will be entitled as against the owner to payment out of the proceeds.

It is unnecessary in this case to discuss the vexed question, whether a part owner of a ship has a specific lien on the share of his co-owner for his portion of the expenses of fitting out and running her. Lord Hardwicke was of opinion that he has, and he decreed in favor of the part owner against the share of a co-owner who had died without contributing his share of the expenses. With respect to this ruling, Judge Story observes: "After all, there would seem to be intrinsic equity in the doctrine maintained by Lord Hardwicke, and as liens may arise either from express or implied agreements, it is but a reasonable presumption (in the absence of all-controlling circumstances) that part owners do not intend to rely solely upon the personal responsibility of each other to reimburse themselves for expenses and charges incurred upon the common property for the common benefit; but that there is a mutual understanding that they shall possess a lien *in rem*." (Story on Part., sec. 444.)

In England, the law appears to be settled adversely to the existence of the lien (*Ex parte Harrison*, 2 Rose, 76; *Ex parte Young*, Id. 78, n.); but in America much diversity of opinion has prevailed. Mr. Justice Curtis thinks that the decisions may in some degree be reconciled by attending to the distinction between cases where the owners occupy towards each other the relation of mere tenants in common of a chattel, and those where they are partners in a common adventure. In the latter case the lien unquestionably exists. But if there be not that relation, the learned judge

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was of opinion that there was no lien. (*The Larch*, 2 Curt. 434.) If, as held by Mr. Justice Curtis, the lien be confined to cases of actual partnership between the part owners, there would be much ground to contend that under the circumstances of the present case the parties bore that relation to each other, or at least such a relation of *quasi* partnership as would be sufficient to give rise to a lien. But this question it is not necessary now to decide, nor the further question, whether, if the lien exists, it could be enforced by an original proceeding in the admiralty. (See *The Larch*, *ubi supra*; *The Young Mechanic*, 2 Curt. 404; *Kellum v. Emerson*, Id. 79.)

The vessel in question in this case was a small craft owned in this state, and employed exclusively in the navigation of its interior waters. Section 3055 of the Cal. Civ. Code provides that "the master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made, or liabilities necessarily incurred by him for the benefit of the ship; but has no lien for his wages." Whether the lien thus created is a strictly maritime lien, and capable of being enforced by a direct proceeding *in rem* in the admiralty, is not material now to inquire or decide. The present proceeding is against surplus proceeds in the registry. The duty of ascertaining to whom they belong devolves upon the court as a necessary incident to the jurisdiction it incontestably possessed to decree a sale to satisfy maritime liens; and the objection that the admiralty has no jurisdiction over matters of account, whatever be its force when an original suit is brought to enforce a lien not strictly maritime, and therefore "not peculiarly within the jurisdiction of a court of admiralty," has no application to a case like the present, where the court is obliged to determine to which of two opposing claimants a fund in its possession should be paid. My opinion is that the petitioner, *as master* of the ship, had, under the state law, a lien upon her for his advances incurred for her benefit, that that lien attaches to her surplus proceeds remaining in the registry, and that as between him and the representatives of the other part owner he is entitled to be paid out of the proceeds.

**RICHARD F. KNOX ET AL. v. THE GREAT WESTERN
QUICKSILVER MINING CO.**

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 18, 1878.*

1. **PATENTS—PROFITS RECOVERABLE IN EQUITY.**—In a suit in equity for the infringement of a patent by the use of the patented invention, the patentee is entitled to recover the profits resulting to the infringer from the use of the invention.
2. **SAME—ROYALTY.**—In such case, the patentee is not limited in his recovery in equity to the amount of the royalty established by him for the use of his invention.
3. **PROFITS DEFINED.**—The profits, which the patentee is entitled to recover in equity from the infringer by use of the patented invention, are not the profits of the business, but the value of the advantages derived by the infringer from the use of the invention over what he would have by the use of other machines then known and open to the public, and adequate to produce an equally beneficial result.
4. **SAME.**—The fact that the general result of the business is unprofitable does not affect the recovery. The question is, What advantage in the reduction of cost, etc., has been derived from the use of the invention?
5. **ACCOUNT EXTENDS TO TIME OF TAKING.**—The account should be extended to the time of the taking, including the profits resulting from the use of the invention, whether by means of the particular machine in use at the time of the commencement of the suit, or of others subsequently constructed and used.
6. **INVENTION COMPARED WITH EXISTING MACHINES.**—For the purposes of an account of profits, the comparison of the invention should be made with other machines in existence, or known, and open to public use at the time of the infringement complained of, and not with machines subsequently invented, or for the first time constructed or known, or machines not open to public use.
7. **EVASION—CHANGE OF LOCATION OF PART.**—A change of location of a part in a patented combination, where there is no new function performed by the changed member in its new location, will not evade a patent.

Before SAWYER, Circuit Judge.

EXCEPTIONS to master's report of profits. The facts sufficiently appear in the opinion to illustrate the points discussed.

* This case was accidentally omitted in volume 5. The appeal in this case, and the writ of error in the action at law, having been withdrawn, the decree and judgment have become final. The case is deemed worth inserting in this volume.

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M. A. Wheaton, for the complainant.

Estee & Boalt, Cope & Boyd, and Garber & Thornton, for the defendants.

SAWYER, Circuit Judge. To discuss all that is said by counsel in support of the exceptions to the master's report would be to re-examine the questions tried and determined in the action at law now in the supreme court on writ of error, and again considered on the original hearing of this case.

1. It is earnestly urged that the master adopted an erroneous principle in estimating the profits which the complainant is entitled to recover; that it being shown that complainant had established a royalty of six thousand dollars for each furnace of twenty tons capacity for the use of his invention, the amount of the royalty is the utmost limit of the amount he is entitled to recover in equity, as well as at law. But the statute, and the rule established by the decisions of the supreme court, are otherwise. The statute provides that "upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained." (R. S., sec. 4921.) This is an express statutory recognition of the different measures of recovery in suits in equity and actions at law; and it not only expressly authorizes the recovery in equity of the profits resulting from the use of the invention, but in addition thereto the damages which the complainant would be entitled to recover at law; and the latter, in the discretion of the court, may also be trebled. The established royalty might be the measure of the mere damages, but it constitutes no element affecting the profits derived by the defendant from the use of the invention unless it is paid, and if paid, there would be no occasion for an account. In *Packet Co. v. Sickles*, the supreme court recognizes the right to recover profits made by the use of the invention, where it is said that "the rule in suits of equity of ascertaining by a reference to a master the profits which the defendant has

made by the use of the plaintiff's invention" stands upon the principle "of converting the infringer into a trustee for the patentee, as regards the profits thus made." (19 Wall. 617. See also *Burdell v. Denig*, 92 U. S. 720; *Cowing v. Rumsey*, 4 Fisher, 277; *Vaughan v. C. P. R. R. Co.*, 4 Saw. 282.) In *Mowry v. Whitney*, 14 Wall. 651, the court says upon this subject: "The question to be determined in this case is, what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits. They are all the benefits he derived from the existence of Whitney's invention. * * * The inquiry then is, what was the advantage in cost, in skill required, in convenience of operation, or marketability, in bringing car wheels by Whitney's process from the condition in which they are when taken hot from the molds, to a perfected state, over bringing them to the same state by those other processes, and thus rendering them equally fit for the same service? That advantage is the measure of profits."

2. But it is urged that the evidence does not show that defendant made any profits, and that the master erred in finding as profits the difference in the cost of reduction of ores between the infringing furnace and other furnaces open to public use, when it does not appear that that amount of profits, or indeed any profits, resulted from working the mine. The supreme court answers this objection by saying, in substance, that it is not the profits of the business as a business that is to be considered, but the advantage derived to the infringer in the diminished cost, etc., of carrying on the business by the use of the invention. Thus, in the *Carwood Patent case*, 94 U. S. 710, the supreme court says upon this point: "It has been argued that it would have been better for these defendants, if, instead of repairing the crushed and exfoliated ends of the rails, they had cut off the ends and relaid the sound parts, or had caused the rails to be re-rolled. Experience, it is said, has proved that repairing worn-out ends of rails is not true economy,

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and hence it is inferred that defendants have derived no profits from the use of the plaintiff's invention. The argument is plausible; but it is unsound. Assuming that experience has demonstrated what is claimed, the defendants undertook to repair their injured rails. They had the choice of repairing them on the common anvil, or on the complainant's machine. By selecting the latter they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage growing out of their invasion of the complainant's patent. If their general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from loss. In settling an account between a patentee and an infringer of the patent, the question is not what profits the latter has made in his business, or from his manner of conducting it, but what advantage has he derived from his use of the patented invention?"

And, again, in the recent case of *Mevs v. Conover* (11 Off. Gaz. 1112), the supreme court says: "The only errors assigned in this case are to the confirmation of the master's report, and they relate to the ascertainment of the profits, which the defendant had made by his unauthorized use of the plaintiff's invention; that the machine employed by the defendant in splitting wood was an infringement of the plaintiff's patent is established by the decree, which sent the case to the master, and no complaint is made of that; but it is contended that the master erred in reporting that there was saved to the defendant seventy-five cents per cord in the wood split by him, and made into bundles. In the ascertainment of profits made by an infringer of a patented invention, the rule is a plain one. The profits are not all he made in the business in which he used the invention, but they are the worth of the advantage he obtained by such use; or, in other words, they are the fruits of that advantage. (*Mowry v. Whitney*, 14 Wall. 651.) We are not convinced that the rule declared in that case was not followed in this. The patented invention infringed by the defendant was a new and improved machine for

splitting kindling-wood, and a distinguishing feature of it—perhaps the principal feature—was a device for the automatic feeding of the wood to the reciprocating splitting knives, or cutters, by a movable platform, or apron, carried forward by an endless chain. That device the defendant used, though it is said he used it in another machine, known as Green's. The evidence is full and uncontradicted, that an advantage is gained in splitting kindling-wood by a machine with that device of at least seventy-five cents a cord over splitting it by hand, or without that device. It was in harmony with this evidence that the master reported, and the court decreed. It is urged, however, that the Green machine, in which the defendant used the plaintiff's invention, was old and defective, and that no profits were actually received from such a use. But if such be the fact, if the defendant was a loser by splitting wood with the Green machine, his loss was less to the extent of seventy-five cents on each cord split than it would have been had he not used the patented invention. Such a result was equivalent to an equal gain, and it was rightly estimated as a part of the profits for which the infringer was responsible."

It can scarcely be supposed that the defendant in this case has gone on for more than three years at a loss, reducing ores to the extent of about a hundred thousand tons, the reduction of which required the erection and use of two new furnaces of the same kind, in the face of and pending this litigation, and at the risk of being mulcted in large damages if finally unsuccessful in the litigation. But however this may be, the cases cited authoritatively dispose of this exception, and foreclose further discussion upon the point in this court.

3. Another exception is, that the master should have limited his accounting to the one furnace which had been constructed prior to the commencement of this suit, and not extended it to the two furnaces erected and used at the same mine pending the suit; that as to the latter the causes of action had not arisen, and they are not involved in this accounting. The suit is for an infringement of complainants' patent by the use of his invention. It is not a matter

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of any moment by what particular machine defendant accomplished the infringement. He was infringing at the commencement of the suit, which is to obtain an account of profits resulting from the infringement, and an injunction against further infringement.

Defendant continued the infringement by using the same furnace then in use, and by constructing and using others at the same mine. The profits resulting from the infringement in the use of the invention are sought to be recovered. The supreme court has held that the accounting should be continued down to the time of taking the account; and if so, I see no reason why it should not cover the profits of the entire infringement by use of the invention, by whatever machine effected, as well as the profits resulting from the use of the particular machine used at the time of the commencement of the suit. If the infringement is by the manufacture and sale of the invention, the accounting must necessarily extend to all sales to the time of the accounting, or the accounting must stop at the commencement of the action; for the same machine can not well be made and sold before the bringing of the suit, and again after its commencement. I can perceive no reason for applying a different rule in the case of the use of an invention from that applicable to its manufacture and sale. Besides, an injunction would certainly not be limited to the machine in use before, or at the time of, the institution of the suit. I think the accounting properly embraced all the machines containing the invention used by defendant at its mine down to the time of the accounting.

4. Assuming what is called the modified Green furnace—the last one erected by defendant—not to be an infringement, it is claimed that this furnace was open to public use, and is equal to or better than complainants'; and that the comparison for the purpose of ascertaining the profits should have been made with this furnace. But this furnace was not in existence during a large portion of the time covered by the accounting. If not an infringement, it is the first furnace of the kind ever constructed. It was built pending this suit, long after its commencement, and long

after the judgment at law, and, doubtless, with the careful purpose of evading complainants' patent. It is possible that somebody may yet invent a furnace far superior to any now in use. If such should be the case, before this accounting is finally settled, would it be pretended that the comparison should be made with such furnace because at the time of the infringement complained of that furnace was not invented or patented, and, therefore, was open to public use, if the defendant or others had only known enough to make one of the kind? Such a claim would be simply preposterous. The comparison must be with machines, at the time of the infringement, both known and open to public use.

5. Another exception is to the allowance by the master in the accounting of the profits resulting from the use of the modified Green furnace, which, it is claimed, is not an infringement of complainant's patent.

This furnace was constructed April 10, 1877—after the trial and judgment in the action at law—and doubtless, as before remarked, with a view to avoiding the future consequences of the judgment in that action. It is the only furnace referred to by defendant's counsel not before the jury on the trial of that action. As it was not passed upon by the jury, it is necessary to inquire whether it is an infringement.

The jury found the *original* Green furnace to be an infringement, and the verdict settles the point as to that furnace, so long as the judgment in the action at law stands. If the *original* Green furnace is an infringement, no proposition can be plainer, to my mind, than that the *modified* Green furnace is equally so. The modification consists in so reducing the height of the furnace above the fire-places that the top will be at the proper distance above the fires for the exit flues to admit of the fumes being maintained at a temperature sufficiently high to pass out before condensation—that is to say, at the same or about the same height above the fires at which the exit flues in the original Green furnace passed out at the side of the furnace; then inserting the exit tubes in the center of the top, so that the fumes

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shall pass out at the top instead of the side, as in the original, there being two fire-places on each side of the modified furnace in the same positions as in the original. It is earnestly insisted by defendant's counsel, that by this location and arrangement of the flues the heat from the fires is not drawn across the furnaces as in the complainants', and in the original Green furnace—one of the objects to be accomplished by locating the exit flues in the side opposite the fire-places—and that, therefore, one important element in the complainants' combination and improvement is wanting. But it is perfectly plain to be seen that the heat is drawn across by this arrangement substantially, and even precisely, as in the original. The heat from the fire-places on one side is drawn to the center, and from the opposite side to the same point, where the heat from the fires on the opposite sides unites and passes out through the flues, the two operating together and drawing the heat entirely across the furnace, heating all the ore uniformly. Or look at the modified furnace in another aspect. Pass a solid plane of the full width of the furnace down through the center of the flues to the bottom of the furnace, leaving half of the flues on each side, and we have two furnaces placed back to back, each with fire-places on one side, and exit flues on the opposite side, at the top to be sure, but also in the side at the same height and in the same position as the original Green furnace; and in each furnace the heat is drawn entirely across and passes out at the opposite side at the same height and position as in the original Green furnace. Cut off the top of the *original* Green furnace at the exit flues, and the exit flues, without changing their position, will be at the top as well as in the sides opposite the fire-places, and will be in the same position as in the modified Green furnace, divided into two, as suggested. In this aspect there is, in fact, no change in the location of the flues. It can make no difference that we do not, in fact, insert the partition, and make two furnaces thereby, instead of one double furnace. It in no way affects the operation of drawing the heat across. The operation is precisely the same in both. In the language of the master: "It has

substantially the same combination of the same parts, and the same number of parts, all operating in substantially the same way, and producing the same results, the only change being in the place of the outlet vapor flue." In *Adams v. Joliet Manufacturing Co.*, it is said by the court: "A change of location of a part in a combination where there is no new function performed by the changed member in its new location will not evade a patent." (12 Off. Pat. Gaz. 94.) In this case, the changed part—if, in the view suggested, there can be said to be a change—performs no new function. It operates in precisely the same way, and accomplishes the same result in the same mode, in the combination. This exception must, therefore, be overruled. If I am in error upon this point, the master has made a separate report as to the profits resulting from using the modified Green furnace, and the supreme court will be able to correct the decree in this particular, if right in other respects.

6. As to the other points of the master's report to which exceptions have been taken, I agree with the master. The Neate and Luckhardt furnaces are the only ones, besides the Almaden furnace, to which testimony was with any degree of definiteness directed with reference to profits; and neither of them was open to public use without payment of a royalty, as the evidence shows. But if the comparison is to be made with either of them, I do not think the result would be more favorable to the defendant. There can be no doubt, from the evidence, that either the furnace of complainant, or either of the Green furnaces, is greatly superior to either the Neate or the Luckhardt furnace. After a careful consideration of all the testimony, and especially if other elements of profits indicated by the evidence—such as more perfectly and uniformly roasting the ores; the greater saving of quicksilver; the diminished sickness of the workmen from salivation, and the like—be considered, as they should be, I do not think a dollar per ton by any means too high an estimate of the advantages derived from using either of the former over either of the latter. If there is any error, there seems an under, rather than an over, estimate of profits. One dollar per ton is not a very

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large amount of profit in the reduction of a single ton of ore. The reduction in cost of so common and simple an operation as splitting a cord of kindling-wood by the patented machine in one of the cases already cited was nearly as much. The large amount in the aggregate results from the immense quantities of ore reduced during the more than three years covered by the accounting that have elapsed pending this contest.

The aggregate amount may seem "crushing," as suggested by defendant's counsel, when compared with six thousand dollars per twenty-ton furnace royalty for which the right to use the invention might have been purchased. But if so, this legitimate result, in case of final defeat, was one of the risks assumed by defendant when it elected to contest the complainants' right, rather than pay the royalty properly demanded should the patent turn out to be valid, and to have been infringed. The defendant entered into the contest advisedly, well knowing the consequences of defeat, for when the complainants elected an account in equity as their most advantageous remedy, the defendant drove them to an action at law, doubtless to avoid the accounting and limit them to damages; and when the action at law was brought, again endeavored to confine complainants to mere damages by moving to strike from the complaint the part preserving the right to an account in this suit after establishing their right at law; but the motion was denied by Mr. Justice Field. (3 Saw. 422.) The defendant, therefore, can have no ground of complaint on the score of the large amount recovered, provided it be fairly the result of the use of complainants' duly patented inventions.

I am not satisfied from the large mass of evidence, which seems to cover the entire field of quicksilver mining and furnaces, that at the time of issuing the patents held by complainants it had been demonstrated by actual experiments that any furnace then known would profitably reduce quicksilver ores of the grades now advantageously worked by complainants' and the Green furnaces. It is apparent to me, from the evidence, that complainants' furnace was the first to practically and profitably reduce low-grade

quicksilver ores; and that these furnaces of complainants and defendant are still greatly superior to any others in use, and are capable of profitably reducing ores that can not be worked with profit in other furnaces not embodying substantially the same elements and combinations. The Luckhardt furnace is the one apparently most confidently relied on by the defendant as being practicable and most nearly approaching in usefulness those used by complainants and the defendant. Defendant erected and used for a time one of them at its mine; and although its testimony is to the effect that it was a success, but of too small capacity, the significant fact remains that it was torn down, and when demolished defendant did not build another Luckhardt furnace of larger capacity, but did erect in its place a Green furnace, which was afterward followed by another, notwithstanding the pending litigation, and the risk of being called upon to account for a large amount of profits resulting from its use in case of failure to defeat the pending actions.

Besides, other mine-owners pay the large royalty established by the complainants for the use of their inventions, which they would not be likely to do if there were other furnaces equally good, or nearly so, open to public use, or to be had at a smaller royalty. These facts of themselves speak volumes in favor of the superiority of the furnaces of complainants, and those constructed and used by defendant, over the Luckhardt or any other furnace. The testimony, all considered, leaves no doubt on my mind that the furnaces used by complainants and defendant, and those embodying the same elements and combinations, and operating upon the same principles, are greatly superior to any others in use for reducing quicksilver ores. And it also seems clear to me that the Green furnace and the modified Green furnace embody the elements and combinations found in complainants' furnace.

This suit was commenced in October, 1874. Upon the application of defendant, the proceedings were stayed, and the complainants required to bring their action at law to establish their rights under their patents, which was accordingly done. After a laborious trial, the jury, under in-

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structions of the court as to the law applicable to the case, found the patents held by plaintiffs to be valid, and the Green furnace to be an infringement, the verdict being special upon each claim by itself. The verdict was set aside upon some of the subordinate claims, but confirmed by the court on the other and principal claims. Judgment was entered in February, 1876, and a writ of error to the supreme court perfected February 4, 1878. The validity of the complainants' patents, and their infringement, having been established in the action at law, nothing was left to be done except for complainants to apply for their injunction and accounting in the equity suit which had in the mean time been stayed. The accounting resulted in the master's report now under consideration. If there is any error in these proceedings, in my judgment, it is not in the accounting, but it will be found in my construction of the patents in the action at law. Upon that point, as counsel were informed at the time, and again upon the decision of the motion for new trial, my mind was not wholly free from doubt—not that a better furnace for reducing quicksilver ores had been constructed by complainants than was ever before in use, but whether the claims in the patents were sufficient to secure the valuable features combined in the furnace. Defendants took their exceptions, and, a bill of exceptions having been duly settled, the construction adopted is now before the supreme court for review. If the judgment in the action at law should be affirmed, I can perceive no error in the accounting. If reversed, of course, the basis of the accounting will be withdrawn. I regret that the final decision of the action at law could not have been had before passing upon the master's report.

Let the exceptions to the master's report be overruled, the report be confirmed, and a final decree entered for complainants in accordance therewith.

Statement of Facts.

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IN RE WONG YUNG QUY, ON HABEAS CORPUS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MAY 24, 1880.

1. CONSTITUTION—DISINTERMENT OF CHINESE.—The statute of California, making it an offense to disinter or remove from the place of burial the remains of any deceased person without a permit, for which a fee of ten dollars must be paid, does not violate subdivision 3 of section 2, article I of the constitution of the United States, providing that "congress shall have power to regulate commerce with foreign nations."
2. SAME.—Nor does it violate subdivision 2 of section 10, article I, providing that "no state shall, without the consent of congress, lay any impost or duties on * * * exports."
3. SAME.—Nor is it in conflict with the fourteenth amendment, which prohibits any state from denying to "any person within its jurisdiction the equal protection of the laws."
4. SAME—TREATY WITH CHINA.—Nor does it violate the fourth article of the treaty with China, called the Burlingame treaty, which provides that "Chinese subjects in the United States shall enjoy entire liberty of conscience, and shall be exempt from all disability or persecution on account of their religious faith or worship." (16 Stat. 740.)
5. SAME.—The act is a sanitary measure within the police powers of the state, and as such is valid.
6. A CORPSE IS NOT PROPERTY, and the remains of human beings carried out of the state for burial in a foreign country are not exports within the meaning of the clause of the national constitution prohibiting the laying of imposts or duties by the state upon exports.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

ON April 1, 1878, the legislature of California passed an act entitled "An act to protect public health from infection, caused by exhumation and removal of the remains of deceased persons," sections 1, 2, 3, 4, and 6 of which are as follows:

"SECTION 1. It shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons so doing shall first obtain from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose. Nor shall such body or remains disinterred, exhumed, or taken from any grave,

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vault, or other place of burial or deposit, be removed or transported in or through the streets or highways of any city, town, or city and county, unless the person or persons removing or transporting such body or remains shall first obtain from the board of health or health officer (if such board or officer there be), and from the mayor or other head of the municipal government of the city or town, or city and county, a permit in writing so to remove or transport such body or remains in and through such streets and highways.

"SEC. 2. Permits to disinter or exhume the bodies or remains of deceased persons, as in the last section, may be granted, provided the person applying therefor shall produce a certificate from the coroner, the physician who attended such deceased person, or other physicians in good standing cognizant of the facts, which certificate shall state the cause of death or disease of which the person died, and also the age and sex of such deceased; and provided, further, that the body or remains of deceased shall be inclosed in a metallic case or coffin, sealed in such manner as to prevent, as far as practicable, any noxious or offensive odor or effluvia escaping therefrom, and that such case or coffin contains the body or remains of but one person, except where infant children of the same parent or parents, or parent and children, are contained in such case or coffin. And the permit shall contain the above conditions and the words, 'Permit to remove and transport the body of —, age —, sex —;' and the name, age, and sex shall be written therein. The officer of the municipal government of the city or town, or city and county, granting such permit, shall require to be paid for each permit the sum of ten dollars, to be kept as a separate fund by the treasurer, and which shall be used in defraying expenses of and in respect to such permits, and for the inspection of the metallic cases, coffins, and inclosing boxes herein required; and an account of such moneys shall be embraced in the accounts and statements of the treasurer having the custody thereof.

"SEC. 3. Any person or persons who shall disinter, exhume, or remove, or cause to be disinterred, exhumed, or

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removed from a grave, vault, or other receptacle or burial place, the body or remains of a deceased person, without a permit therefor, shall be guilty of a misdemeanor, and be punished by fine not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days, nor more than six months, or by both such fine and imprisonment. Nor shall it be lawful to receive such body, bones, or remains on any vehicle, car, barge, boat, ship, steamship, steamboat, or vessel, for transportation in or from this state, unless the permit to transport the same is first received and is retained in evidence by the owner, driver, agent, superintendent, or master of the vehicle, car, or vessel.

“SEC. 4. Any person or persons who shall move or transport, or cause to be moved or transported, on or through the streets or highways of any city or town, or city and county of this state, the body or remains of a deceased person which shall have been disinterred or exhumed, without a permit as described in section 2 of this act, shall be guilty of a misdemeanor, and be punishable as provided in section 3 of this act.”

“SEC. 6. Nothing in this act contained shall be taken to apply to the removal of the remains of deceased persons from one place of interment to another cemetery or place of interment within the same county; provided, that no permit shall be issued for the disinterment or removal of any body, unless such body has been buried for two years.” (Stat. 1877-8, 1050.)

Geo. E. Bates and J. M. Rothchild, for petitioner.

Crittenden Thornton, for respondent.

By the Court, SAWYER, Circuit Judge. The petitioner, Wong Yung Quy, is, and Wong Wai Toon was, in his lifetime, a subject of the emperor of China, of the Mongolian race, residing in the United States. Wong Wai Toon died in January, 1876, and was buried in Laurel Hill Cemetery, a public cemetery of the city and county of San Francisco. In October, 1879, petitioner, a relative of the deceased, having

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complied with all the provisions of said act, except the payment of ten dollars required by said act to be paid for an exhumation and removal permit, demanded from the proper authorities permission to remove the remains of said Wong Wai Toon from said cemetery, and ship them to China. Refusal having been made on the ground of the non-payment of said fee of ten dollars required to be paid by said act, the petitioner proceeded to disinter and remove said remains without a permit, and was arrested in the act, tried and convicted for the offense created by said statute in the court having jurisdiction, and sentenced to pay a fine of fifty dollars, or, in default of such payment, to imprisonment in the city and county jail for a period of twenty-five days. Failing to pay the fine, and being imprisoned in pursuance of the judgment, he obtained a writ of *habeas corpus*; and he now asks to be discharged on the ground that the provision of said act, requiring the payment of said fee for a permit, violates the treaty with China, known as the Burlingame treaty, and the constitution of the United States, and is therefore void. All the other provisions of the act having been complied with, the only question is as to the power of the legislature to require the petitioner to take out a permit at a cost of ten dollars, as a condition of disinterment and removal of the remains of his relative from their place of burial.

The first point made is, that the act, in the requirement in question, violates subdivision 3 of section 8, article I of the national constitution, which provides that "Congress shall have power to regulate commerce with foreign nations." We are unable to perceive any violation of this provision of the constitution, under the broadest construction claimed by petitioner for the term "commerce," even if it includes the transportation of the remains of aliens to their own country for final sepulture. There is no reference to aliens or to any extraterritorial act of any kind anywhere in the statute, except in the last clause of section 3, which is a wholly independent and different provision from that under consideration, creating an additional offense, and might be wholly omitted without affecting the remainder of the act. It is

not necessary now to consider the question of the validity of that provision. The act deals with matters wholly within the state—within its territory—with the remains of parties who have lived and died within its jurisdiction, and which have been buried and which still remain buried in its soil; and professedly and apparently for sanitary purposes. The statute knows nothing of the objects or motives of the exhumation, except as provided in section 6, that the act shall not apply to removals from one place of interment to another in the same county. This exception is doubtless made for those common cases wherein no vault or burial place has been provided for the deceased during life, and the remains are temporarily deposited in a public receiving vault, or the vault or grounds of some friend, till the surviving friends can provide for a place of final sepulture. These removals are ordinarily from one place of burial to another in the same or an adjacent cemetery, where there are several cemeteries lying near each other, as in San Francisco, and therefore not so fully within the reason upon which the act is founded. The statute deals with the local interterritorial fact of burial and exhumation, without regard, in other respects than that stated, to motive or intention, race or nation, citizenship or alienage, future domestic or foreign sepulture.

The matter of the burial and exhumation of the dead, with a view to sanitary objects, has in all times, and among all civilized nations, been regarded as a proper subject of local regulation. It is founded upon the law of self-protection. The fact that in many, or even most instances, the object of disinterment is to send the remains abroad cannot affect the question. The local sanitary considerations must be the same, whatever the purpose of exhumation and transportation through the streets of a city. The fact that the Chinese exhume and transport to their own country the remains of all, or nearly all, their dead (amounting to more than ninety per cent. of all such removals), while other aliens and citizens comparatively but rarely perform these acts, only shows that this generality of practice requires more rigid regulations and more careful scrutiny,

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in order to guard against infectious and other sanitary inconveniences, than would otherwise be required. In *Secor's case*, Pratt, J., says: "A proper respect for the memory of the dead, a regard for the tender sensibilities of the living, and the due preservation of the public health, require that the corpses should not be disinterred or transported from place to place, except under extreme circumstances of exigency." (18 Alb. L. J. 488; 31 Legal Int. 268.) The exposure of unburied human remains, or neglect to inter the same by the person on whom the duty is cast, is a misdemeanor at common law. (See *Reg. v. Stewart*, 12 Ad. & E. 773; *Chapple v. Cooper*, 13 Mes. & Wels. 252; *Ambrose v. Kerrison*, 10 Com. B. 776; *Jenkins v. Tucker*, 1 H. Black. 394; Willes, 536.) And this is doubtless so in part, at least, upon sanitary considerations generally recognized among enlightened nations.

We see nothing in the language of the act, in the surrounding circumstances, or in the nature of the subject-matter upon which the statute operates, to justify us in holding that the object of the legislature was to impose burdens on the commerce or intercourse between this country and China, rather than to provide wholesome sanitary regulations for the protection of our people. The statute is general, and operates wholly upon matters within the territorial jurisdiction of the state, and without discrimination as to remains to be removed to any considerable distance, whether within or without the state, and is within the principle of the case *In re Rudolph*, recently decided in the United States circuit court of Nevada, upon drummers' licenses. (*Ante*, p. 296.) The exhumation and removal of the dead is not a matter of public indifference, harmless in itself, like the style of wearing the hair, as in the queue case; but it affects the public health, and its regulation is, like the regulation of slaughter-houses and other noxious pursuits, strictly within the police powers of the state. (See *Ex parte Shrader*, 33 Cal. 286; *Slaughter-house Cases*, 16 Wall. 36.)

In *Gibbons v. Ogden*, 9 Wheat. 203, Mr. Chief Justice Marshall says: "But the inspection laws are said to be reg-

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ulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the states. * * * The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass."

If then, as claimed, the transportation of the remains of deceased persons to China is a part of foreign commerce, these supervising and inspection laws "act upon the subject before it becomes an article of foreign commerce," and while the remains are being "prepared for that purpose." They simply provide that the preparation of the remains for foreign transportation, while still within the state and under its jurisdiction, shall be made in such a manner as not to be detrimental to the public health.

The principles relating to sanitary laws recognized in *City of New York v. Miln*, 11 Pet. 102; *Thorpe v. R. and B. R. Co.*, 27 Vt. 149; *The Passenger Cases*, 7 How. 283; *Railroad Co. v. Huson*, 95 U. S. 471, and numerous other cases, are broad enough to cover the provision in question. In these respects this case differs materially from the *queue case*, *Ah Kow v. Nunan*, reported in 5 Sawyer, 553, and is more like the case arising under the cubic air statute, which we held to be constitutional. It being within the constitutional power to regulate the disinterment and removal of the dead, and to provide officers to scrutinize and supervise the operation in order to secure a conformity to the laws, we see no reason why a fee cannot be charged to and collected from those who desire to exercise the privilege, to defray the ex-

penses of the inspection and supervision. The fee is charged under the law, not for the transportation or for the privilege of carrying the remains out of the country, but to pay the expenses of supervising their disinterment and due preparation for passing through the territory of the state, and through the streets of populous cities either to other parts of the state or elsewhere, without endangering the health of the people.

For similar reasons the provision in question does not violate subdivision 2 of section 10, article I of the constitution, which provides that "no state shall, without the consent of congress, levy any imposts or duties on imports or exports, except what is absolutely necessary for its inspection laws." The case also seems to be within the terms of this exception. Besides, the remains of deceased persons are not "exports" within the meaning of the term as used in the constitution. The term refers only to those things which are property. There is no property in any just sense in the dead body of a human being. (18 Alb. L. J. 487; 17 Id. 258; *Guthrie v. Weaver*, 1 Mo. App. R. 136; *Wynkoop v. Wynkoop*, 42 Pa. St. 293; *Kemp v. Wickes*, 3 Phillim. 264; *Rex v. Sharpe*, Dears. & B. 160; *Pierce v. Pro. of Swan Point Cemetery*, 14 Am. Rep. 667; 10 R. I. 227; and cases cited.) There is no impost or duty on exports in any proper sense, or in the sense of the constitution. This provision of the constitution was intended to prevent discrimination in matters of trade.

There is no violation of the fourteenth amendment to the national constitution. There is no discrimination against or in favor of any class of residents. It operates upon aliens of all nationalities and upon all citizens alike. It applies to all cases of remains to be removed beyond the boundaries of the county, whether to foreign countries, to other states, or to other parts of this state. And there are no restrictions upon disinterments and removals of Chinese dead to other places within the same county for burial, not applicable to citizens and all other aliens. It may be that the large number of Chinese removals suggested the necessity for stringent supervision; but we see no reason to sup-

pose that the act was not intended to operate upon all within its terms; and the testimony shows, if it is admissible to look at the testimony, that it is, in fact, enforced against all alike. But whether enforced or not, the subject-matter, as we have seen, is a proper one for regulation; and if the act is not enforced upon all alike, there is a gross neglect of duty on the part of those appointed for this purpose under the law. If the provisions of the act affect a larger number of Chinese than of any other class, it is not on account of any discriminations made by the law, but only because under their customs there is a much larger number of disinterments and removals by them than by any others. (*In re Rudolph, supra*, and cases cited.)

There is nothing in the provision in question in conflict with article IV of the Burlingame treaty, which provides that "Chinese subjects of the United States shall enjoy entire liberty of conscience, and shall be free from all disabilities or persecutions on account of their religious faith or worship." Conceding that the religious sentiment of the Chinese requires that they shall remove the remains of their deceased friends to China for final burial, there is nothing in the provision forbidding or unduly obstructing the performance of that rite or religious duty, and nothing that does not equally apply to other aliens and citizens. It is only provided that, in the performance of that duty, proper precautions shall be taken not to endanger the health of the people among whom they have elected to live, and have died and once been buried. The fee established is only to liquidate the portion of the expense of supervision and inspection imposed upon the public resulting from their custom; and, like other expenses of disinterment and removal, which the surviving friends voluntarily incur, is necessarily incident to their peculiar practice. The custom of the Chinese in this respect renders the supervision necessary and proper; and we can perceive no impropriety in charging them with the expense incident to it. The amount of ten dollars may seem large, but it is charged alike to all, and is not so large as to justify us in holding that it was manifestly intended to obstruct the performance of the duty; and

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we do not understand that the amount is regarded as objectionable if the charge is otherwise legal. Besides, it may well be questioned whether the treaty-making power would extend to the protection of practices under the guise of religious sentiment, deleterious to the public health or morals, or to a subject-matter within the acknowledged police power of the state. (See *Reynolds v. United States*, 98 U. S. 145, with respect to religious belief as affected by the first amendment to the national constitution.) But, under the view we take, it is unnecessary to consider the question now.

We are satisfied that the provisions of the act in question do not violate any provision of the national constitution or of the treaty with China, and that there is no ground for discharging the prisoner by this court.

Let the writ be discharged, and the prisoner remanded to the custody of the officer from whom he was taken.

IN RE AH CHONG. IN RE WONG HOY. IN RE
AH YOU. IN RE FOO HOY. IN RE FOO HEE.
IN RE AH MEE. ON HABEAS CORPUS.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

JUNE 9, 1880.

CHINESE TREATY—CONSTITUTION.—The statute of California, prohibiting all aliens incapable of becoming electors of the state from fishing in the waters of the state, violates the fourteenth amendment of the constitution of the United States, also articles V and VI of the treaty with China, and is void.

Before SAWYER, Circuit Judge.

Delos Lake and Thomas D. Riordan, for the petitioners.

A. L. Hart, attorney-general, for the respondents.

SAWYER, Circuit Judge. Article XIX of the new constitution of California, headed "Chinese," in addition to the provisions referred to in *Parrott's case* (*ante*, 349), recently

decided in this court, forbidding the employment of Chinese by any corporation, or on any state, county, municipal, or other public work, also contains the following provision:

“SECTION 4. The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this state; and all contracts for coolie labor shall be void. All companies or corporations, whether formed in this country or any foreign country, for the importation of such labor, shall be subject to such penalties as the legislature may prescribe. The legislature shall delegate all necessary power to the incorporated cities and towns of this state for the removal of Chinese without the limits of such cities and towns, or for their location within prescribed portions of those limits; and it shall also provide the necessary legislation to prohibit the introduction into this state of Chinese after the adoption of this constitution. This section shall be enforced by appropriate legislation.”

In obedience to the mandate of the constitution requiring these provisions to be enforced by appropriate legislation, the legislature, besides the act in question in *Parrott's case*, passed three other acts. One, on April 3, 1880, entitled “An act to provide for the removal of Chinese whose presence is dangerous to the well-being of communities outside the limits of cities and towns in the state of California,” provides that “the board of trustees or other legislative authority of any incorporated city or town, and the board of supervisors of any incorporated city and county, are hereby granted the power, and it is hereby made their duty, to pass and enforce any and all acts or ordinances or resolutions necessary to cause the removal without the limits of such cities and towns, or city and county, of any Chinese now within, or hereafter to come within, such limits. (Stat. 1880, p. 22.) Another act, on April 12, 1880, entitled “An act to prohibit the issuance of licenses to aliens not eligible

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to become electors of the state of California," provides as follows (Id. 39):

"SECTION 1. No license to transact any business or occupation shall be granted or issued by the state, or any county or city, or city and county, or town, or any municipal corporation, to any alien not eligible to become an elector of this state.

"SEC. 2. A violation of the provisions of section 1 of this act shall be deemed a misdemeanor, and be punished accordingly."

And on April 23, 1880, still another act, entitled "An act relating to fishing in the waters of this state," which provides as follows:

"SECTION 1. All aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shell-fish of any kind for the purpose of selling or giving to another person to sell. Every violation of the provisions of this act shall be a misdemeanor, punishable upon conviction by a fine of not less than twenty-five dollars, or by imprisonment in the county jail for a period of not less than thirty days."

All these acts, as well as the acts and constitutional provisions considered in *Parrott's case*, are *in pari materia*; and being so, indicate and illustrate the motive or purpose of the passage of any one of them. The petitioners in the several cases, subjects of China of the Mogolian race, were arrested for taking fish in San Pablo bay within the state, and selling the same in violation of the provisions of the last-named act, tried and convicted before the proper court, and sentenced to imprisonment for the period of thirty days. Being imprisoned in pursuance of the judgments, they severally sued out writs of *habeas corpus*, and now ask to be discharged on the ground that their imprisonment is in violation of our treaty with China, commonly known as the Burlingame treaty, and of the fourteenth amendment to the national constitution. The attorney-general, who appears for the respondent in the interest of the state, does not seek to reopen the question decided in *Parrott's case*, but he endeavors to distinguish the two cases, and relies upon *Mc-*

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Cready v. Virginia, 94 U. S. 391, to support the distinction. Citizens of Maryland were in the habit of crossing over the line into Virginia, and planting oysters in the waters of the latter state. The state of Virginia, desiring to preserve the profits of the business to its own people, passed an act making it an offense for citizens of other states to take oysters from or plant them in the waters of Virginia. McCready was convicted and fined for planting oysters in Ware river, one of the waters of Virginia, in violation of this act. He claimed the act to be void on the ground that it was passed in violation of that provision of the national constitution which says: "Citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The supreme court held that the right to take fish in the public waters of the state is not a privilege of interstate citizenship. It held the state to be the owner, subject to the right of navigation, of the tide lands and the tide waters covering them; also of the fish therein, so far as capable of ownership, while running in the waters. The court, speaking by the chief justice, says: "These (the fisheries) remain under the exclusive control of the state, which has consequently the right in its discretion to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship." (94 U. S. 395.) The right of citizens of Virginia to fish in the public waters of the state, therefore, is a property right vested in the citizen by reason of his local citizenship and as one of the common owners, and not a mere general privilege; and the title to the property being in the public—in the state—it was held that the state might exclude all others than citizens, the common owners, from enjoying the right. The court further says: "The right thus granted is not a privi-

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lege or immunity of general but special citizenship. It does not 'belong of right to the citizens of all free governments,' but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used; and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united—that is to say, by virtue of a citizenship confined to that particular locality." (Id. 396.)

Citizens of other states having no property right which entitles them to fish against the will of the state, *a fortiori* the alien, from whatever country he may come, has none whatever in the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let, or hindrance, is to prevent him from enjoying the same privileges as are "enjoyed by the citizens or subjects of the most favored nation;" and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with immunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions "as are enjoyed by the citizens or subjects of the most favored nation;" and such discriminations are in violation of articles V and VI of the treaty with China, cited in full in *Parrott's case*. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege, it must permit all others to enjoy, upon like terms, the same privileges whose governments have treaties securing

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to them the enjoyment of all privileges granted to the most favored nation.

The fourteenth amendment of the national constitution provides that "no state shall * * * deny to any person within its jurisdiction the equal protection of the laws." To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to those provisions of the constitution. (*Parrott's case*, ante, 349; *Strauder v. West Virginia*, 100 U. S. 303.) It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes *in pari materia* referred to, considered in connection with the public history of the times, that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. The end to be accomplished being unlawful, as we held in *Parrott's case*, it is unlawful to use any means to accomplish the unlawful object, however proper the means might be, if used in a proper case and for a legitimate purpose.

The act is clearly unconstitutional, and a violation of the treaty in discriminating against the Chinese and in favor of aliens of the Caucasian race in all other respects similarly situated. Acts when performed by Chinese are made an offense punishable by imprisonment, while the same acts performed in the same manner and under the same circumstances by other aliens, are not an offense; and such other aliens are exempt from the punishments denounced by the law against them. It is impossible, therefore, to say that the Chinese "enjoy the same privileges, immunities, and exemptions" as are "enjoyed by the citizens or subjects of the most favored nation," as is stipulated they shall by the treaty, or that the "state," by this act, does not "deny"

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to them "the equal protection of the laws," contrary to the fourteenth amendment to the national constitution.

While it is not very likely that the act in question was in fact intended by its framers to apply to any but Chinese, yet, owing to carelessness in the phraseology used, others than Chinese may have occasion to invoke the national constitution for their protection. The language is: "All aliens incapable of becoming *electors* of this state are hereby prohibited from fishing," etc. By article II of the constitution, the right of suffrage is limited to "male persons;" so that all alien women are "incapable of becoming electors," and being so, are within the terms of the statute; so that German, French, Italian, English and Irish women, before becoming citizens, are forbidden to take fish, shrimps, lobsters, oysters, etc., in the waters of California. So also, under the act of April 12, before cited, it is provided that "no license to transact any business or occupation shall be granted or issued by the state, or any county or city, or city and county, or town, or any municipal corporation, to any alien not eligible to become an elector of the state;" and the violation of this provision is made a punishable offense. So that, under the terms of this act, it is an offense to grant or issue a "license to transact any business or occupation" to any alien Caucasian woman; and alien women of European extraction will be unable to engage in any such "business or occupation" as requires a license. A similar infelicity of expression is found in article II of the constitution, relating to the right of suffrage, in which it is provided "that no native of China * * * shall ever exercise the privileges of an elector in this state," without regard to the race to which he belongs. Many persons of the Caucasian race are natives of China, and probably not a few descendants of citizens of the United States, who would fall within the terms of this provision.

Section 4, article XIX of the state constitution, in obedience to which the act now in question was passed, provides that "the presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the state, and the legislature shall discourage their

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immigration by all means within its power." It certainly cannot be the "ineligibility to become citizens" that renders the presence of foreigners "dangerous to the well-being of the state." If the presence of the Chinese as aliens, intending, dead or alive, to return or be returned to their own country, is objectionable to our citizens as being "dangerous to the well-being of the state," it is not difficult to perceive that their presence as citizens, permanently domiciled and multiplying in the state, would be far more objectionable and obnoxious to the welfare of our people. If ineligibility to citizenship were the only objection, it could easily be obviated by striking the single word "white" from the naturalization laws. Indeed, in the late revision of the statutes, the word "white" was inadvertently omitted; but our people made haste to procure its reinsertion by amendment at the earliest opportunity. Thus, from June 22, 1874, to February 18, 1875, Chinese were eligible to citizenship. (*In re Ah Yup*, 5 Saw. 155.) But the people of California were not satisfied with their eligibility, and, in deference to their wishes, they were again made ineligible to citizenship. So ineligibility to citizenship is not the dangerous or objectionable feature. The real objection is more deeply seated and more substantial. Many believe that the time has come when all naturalization laws should be abolished. Should congress come to entertain that view, and repeal the naturalization laws, then all aliens would fall under the ban of this provision of the state constitution.

These various provisions are referred to as instances illustrative of the crudities, not to say absurdities, into which constitutional conventions and legislative bodies are liable to be betrayed by their anxiety and efforts to accomplish, by indirection and circumlocution, an unconstitutional purpose which they cannot effect by direct means.

The act under which the several prisoners are held being void, for the reasons stated, they are in custody in violation of the constitution and a treaty of the United States, and are entitled to be discharged; and it is so ordered.

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Statement of Facts.

IN RE ESTES AND CARTER, IN BANKRUPTCY.

DISTRICT COURT, DISTRICT OF OREGON.

JUNE 12, 1880.

LIEN OF A JUDGMENT.—E. conveyed certain property in fraud of his creditors, and afterwards certain creditors of the firm of E. & C. obtained judgments against said firm and docketed the same; then the firm and members thereof were adjudged bankrupts, and the assignee brought suit against the grantee in the fraudulent conveyance to have the same set aside and obtained a decree to that effect, whereupon the property was sold by the assignee, free from the liens of such judgments, if any, and the proceeds brought into this court for distribution: *Held*, 1. That the lien of such judgments only attached to the property then belonging to the judgment debtor; 2. That the conveyance passed all the estate of the grantor in the premises to the grantee, qualified only by the right of the creditors to subject the same to the payment of their debts, in the manner and time prescribed by law; and, 3. That therefore the lien of the judgments did not attach to the premises, and the proceeds of the sale thereof are the separate estate of E., and must be first equally applied to the payment of his separate creditors.

Before DEADY, District Judge.

On July 19, 1877, Levi Estes and Charles M. Carter were by this court adjudged bankrupts, both as partners constituting the firm of Estes & Carter, and as individuals. On May 4, 1876, Estes was the owner of the undivided one half of lots 3 and 4 in block 39, in this city, and being insolvent, conveyed the same, subject to a mortgage thereon of twenty thousand dollars, to William H. Cole, with intent to hinder, delay, and defraud his creditors. On December 22, 1879, the circuit court for this district, in a suit brought for that purpose by the assignee of the bankrupts against said Cole, gave a decree setting aside and annulling said conveyance as fraudulent. Afterwards, the assignee, upon the order of this court, sold the property free from all liens, if any, except that of the mortgage aforesaid, for the sum of seven thousand six hundred dollars.

Claims, amounting in the aggregate to nineteen thousand four hundred and ninety-eight dollars and nineteen cents, have been proved against the joint estate of the partners and the individual estate of Estes—seven thousand five

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hundred and forty dollars and six cents unsecured, eight hundred and thirty-six dollars and fifteen cents arising upon judgments against the latter; and six thousand seven hundred and sixty dollars and sixteen cents unsecured, and four thousand three hundred and sixty-one dollars and eighty-two cents arising upon judgments against the partnership. Besides these, claims amounting to two thousand eight hundred and thirty-six dollars and fifteen cents, but secured by mortgage upon other property, have been proved against Estes. The judgments were all given and docketed after the conveyance to Cole. There are no assets of the partnership, but the assets of Estes' estate amount to six thousand six hundred and sixty-eight dollars and ninety-one cents, six thousand dollars of which will probably be applicable to the payment of debts.

The assignee, on behalf of certain individual creditors of Estes, filed a petition setting forth the fact of the conflicting claims upon this fund, and asked for an order directing it to be applied exclusively upon the individual debts of Estes, without regard to the supposed lien of any judgment.

The petition was referred to the register when the judgment creditors of the partnership, George Ham, Smith Bros. & Co., H. L. Darr, A. Watts, and John H. Moore demurred to the same upon the ground that on the facts stated the petitioners were not entitled to the relief asked, because the judgments of said creditors were a lien upon the individual property of Estes, which the fund in the hands of the assignee represents. By consent the register made a *pro forma* ruling upon the demurrers, and the matter was certified into court and here argued by counsel.

Erasmus D. Shattuck, for the assignee.

Charles H. Woodward and William W. Page, for the judgment creditors.

DEADY, J. Counsel for the judgment creditors insist that the judgments given against Estes, whether jointly with Carter or alone, were a lien upon the property con-

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veyed by the former to Cole, notwithstanding such conveyance, and the lien now exists against the proceeds thereof in the hands of the assignee.

The argument in support of this proposition assumes that notwithstanding the previous conveyance to Cole, the property as to these judgment creditors at the date of the entry and docket of their judgments, still belonged to Estes, and therefore it became and was subject to the lien of said judgments; and upon the correctness of this assumption the case turns.

On the other hand, counsel for the assignee contend that at the date of the judgments in question, Estes having already conveyed the premises to Cole by a deed valid and operative as between the parties thereto, had no interest in the premises; that they in no sense belonged to him, and therefore the liens of said judgments could not affect or include them.

The Or. Civ. Code, section 266, provides, that "from the date of the docketing of a judgment, * * * such judgment shall be a lien upon all the real property of the defendant within the county or counties where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon." By sections 273 and 279, it is further provided, that an execution against property may be levied upon "the real property belonging to him [the judgment debtor] on the day when the judgment was docketed in the county or at any time hereafter;" and "all property or right or interest therein of the judgment debtor," not specially exempted, "shall be liable to an execution."

Section 51 of chapter 6, relating to conveyances, which is substantially a copy of chapter 5 of 13 Elizabeth, provides, among other things, that every conveyance of any estate in lands, "made with the intent to hinder, delay, or defraud creditors of their lawful * * * demands, * * * as against the person so hindered, delayed, or defrauded, shall be void." (Gen. L., p. 523.)

To show that a judgment is a lien upon land previously conveyed in fraud of creditors, counsel cite *Bump on Fraud*.

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Conv. 465; *Pratt v. Wheeler*, 6 Gray, 522; *Scully v. Kearns*, 14 La. Ann. 436; *Eustman v. Schettler*, 13 Wis. 362; *Jacoby's appeal*, 67 Penn. 434; *Manhattan Co. v. Evertson*, 5 Paige Ch. 465; *Smith v. Ingles*, 2 Or. 43.

In *Pratt v. Wheeler*, *supra*, the point in controversy was not decided. That case only determines that a deed in fraud of creditors is void as against the attachment of any of such creditors. The deed being void as to creditors, it is merely a question of procedure whether a creditor shall attack it in equity by a bill to set it aside, or by process at law, as an attachment or execution against the property covered by it. In Massachusetts, the courts did not possess equity jurisdiction until a late date, and the proceeding by attachment or execution, to assert the right of a creditor against the property of a debtor, covered by a fraudulent conveyance, became and is common.

But whether the mere lien of a judgment which results from the docketing of the same can be used or have the effect of process by means of which a creditor can assert his right against a fraudulent conveyance is another and very different question.

All this and more may be said of the case of *Scully v. Kearns*, *supra*. This was a case of a "simulated" or sham sale of personal property in fraud of creditors, and the court only held that the judgment creditor of the pretended vendor was not bound to proceed specially to have the sale set aside, but might treat it so far void and levy upon the property as that of the judgment debtor.

Eastman v. Schettler, *supra*, does contain a *dictum* to the effect that a judgment obtained against a debtor who has already conveyed his property in fraud of his creditors is, notwithstanding such conveyance, a lien thereon, but the only point decided in the case was that the purchaser of such property at a sale upon such judgment succeeded to the right of the judgment creditor, and might therefore assail such conveyance in the same manner as such creditor.

In *Jacoby's appeal*, *supra*, there was a contest between two judgment creditors for the proceeds of property sold upon the process of the junior of them, the same having

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been conveyed prior to the judgments by the judgment debtor in fraud of his creditors. The court, upon the authority of *Hoffman's appeal*, 8 Wright, 95, in which it was said that it was "the estate of the debtor which was sold at the sheriff's sale, and therefore the liens upon it which attached after the fraudulent grant must be paid in their order," gave the proceeds to the prior judgment creditor.

In *Manhattan Co. v. Evertson*, *supra*, it was held, that as between the mortgagee in a mortgage to secure a previous debt executed by the grantee in a fraudulent conveyance, and the judgment creditors of the grantor in such conveyance, the lien of the latter should prevail. The citation from Bump on Fraud. Conv. is fully to the effect, that in such cases, in contemplation of law, title remains in the debtor, and that judgments against him become liens upon such property, precisely as if no transfer had been made.

But this statement of the law is based, among others, upon the foregoing cases, and it is clear that with the exception of the last two, they do not support the text.

In addition to these authorities, I find that Judge Hoffman, in *re Beadle*, 5 Saw. 351, has held in favor of the lien under circumstances similar to those in this case. The syllabus of the case states the facts and the ruling sufficiently. It is: "Where an insolvent made an assignment to trustees, with intent to hinder and delay his creditors, which assignment was by this court subsequently adjudged void, and trustees conveyed the property to the assignee in bankruptcy: *Held*, that the latter took the property subject to the liens of creditors who had recovered and docketed judgments subsequently to the fraudulent conveyance and before the commencement of the bankruptcy proceedings."

In the course of the opinion of the court, this question is asked: "Could the judgment creditors, by docketing their judgments against the grantor, acquire a lien on the land without previously bringing their bill in equity to set aside the fraudulent conveyance?" and the answer given is: "This question must be settled by the law of this state; and it appears to have been settled ever since the case of *Hager v. Shindler*, 29 Cal. 47, that a conveyance of this description

may be treated by the judgment creditor as absolutely void *ab initio*, and as if non-existent."

But it does not appear that any question concerning the operation or effect of the lien of a judgment arose or was decided in *Hager v. Shindler*.

That was a case where the purchaser of real property, at a sheriff's sale, upon an execution to enforce a judgment against one who had, prior to the judgment, conveyed the premises in question in fraud of his creditors, brought a suit to annul such conveyance as a cloud upon his title, and the court held that the suit could be maintained. Nothing was claimed under or by virtue of the lien of the judgment. Indeed, the statement of the ruling in *Hager v. Shindler* by the court *In re Beadle* shows this. It is: "In that case it was held that the purchaser of land at a sheriff's sale may maintain a bill to set aside and annul, as a cloud upon the title, a deed of the land given before the judgment by the judgment debtor without consideration and to defraud creditors."

And the subsequent cases of *Ferris v. Irving*, 28 Cal. 646, and *Stewart v. Thompson*, 32 Id. 263, referred to by the court, and particularly the concurring opinion of Judge Sawyer in the latter case, are only to the same effect, that the conveyance is void as to the creditor, who may attack it and divest the grantee of his right under it by a sale upon an execution against the grantor in favor of such creditor.

To justify this conclusion it was not necessary that there should be any judgment lien in the case, or even that the judgment should ever have been docketed. The seizure and sale upon the execution was a direct and legal assertion of the creditor's right to treat the conveyance as void, and the conveyance by the sheriff to the purchaser invested the latter with the title to the premises, and these California cases only decide that the purchaser, as such, and as the successor in right of the judgment creditor, could maintain a suit to set aside the fraudulent conveyance as a cloud upon this title without first bringing ejectment for the possession.

On the other hand, in *Miller v. Sherry*, 2 Wall. 248, which

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was a controversy concerning the title to real property between parties claiming under two judgments given against the debtor after he had conveyed the premises in fraud of his creditors, and the subsequent proceedings in equity to subject the premises to the satisfaction of said judgments, the court held that the proceedings in equity on the part of the senior judgment creditor were insufficient to affect the title, and decided in favor of the party claiming under the proceedings on the creditor's bill of the junior judgment creditor.

In delivering the opinion of the court, Mr. Justice Swayne says that after the conveyance, the legal title was in the grantee thereof until divested by the decree on the creditor's bill; and as if it was too plain for argument, assumes and states that the judgments were not a lien upon the premises.

Speaking of the senior judgment, he says: "It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law."

In *Rapleye v. International Bank*, 9 Rep. 469, decided in the supreme court of Illinois, February 4, 1880, a trust deed made to defraud creditors was avoided at the suit of the defendant, which thereupon claimed and obtained a priority in the payment of its judgment from the proceeds of the land thus conveyed by the debtor. The court held, in the language of the syllabus, that "a conveyance, fraudulent as to creditors, is binding on the grantor, so that there is no estate, legal or equitable, remaining in him, on which a judgment lien could attach. The lien only attaches on the avoiding of the deed by the creditor, so that he who thus avoids the deed has the prior lien."

In *Smith v. Ingles*, 2 Or. 44, it was held that the lien of a judgment does not extend to an equity or an equitable title. The case was this: Ingles purchased real property, and for the purpose of defrauding his creditors took the conveyance to his minor children. Burns, a judgment creditor of Ingles, sold the property upon an execution, as the property

of the latter, and became the purchaser thereof. Subsequent to the entry and docketing of this judgment, Ingles mortgaged the premises to Smith, and after the sale Smith brought suit to enforce the lien of his mortgage, making Burns a party. The court held that the lien of Burns' judgment did not affect the property.

As the law of the state is the law of this case, it is claimed that the ruling in *Ingles v. Smith* is the decision of this question in favor of the assignee.

The case is not clear in some points, but upon authority, the transaction was not a conveyance by the debtor in fraud of his creditors within the statute, and therefore void, but a purchase by Ingles in the name of others, with a fraudulent intent. This being so, as to the creditors, equity would hold the grantees in the conveyance to be the trustees of a resulting trust in favor of Ingles, and subject the trust estate to the payment of his debts. (Bump on F. C., 237; *Guthrie v. Gardner*, 19 Wend. 415.)

In this view of the matter the case is scarcely in point. The legal estate was never in Ingles, and the case only decides that the lien of the judgment against him did not affect his resulting trust or equity in the premises. But in the case under consideration, Estes, at the date of docketing these judgments, had the legal estate in the premises or nothing. In the language of the court, in *Rappleye v. International Bank*, *supra*, "it is a mistaken notion, that after the making of a fraudulent conveyance as to creditors, there remains in the fraudulent grantor an equitable estate in the land conveyed. If this were so, he could sell and convey to another such estate."

It is also claimed that the statute limiting the lien of a judgment in *Burns v. Ingles*, was more restricted than the present. But I think they are substantially the same. The former (Gen. L. 1853-54, p. 100) declared that "such lien shall extend to all the real property of the judgment debtor, owned by him at the time of docketing the judgment," etc. From the present one there is only omitted the tautology, "owned by him," the expression, "property of the judgment debtor," being considered the full equivalent thereof.

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So stand the authorities, pro and con, upon this subject. Of those which are controlling in this court, the one from the supreme court of this state (*Smith v. Ingles*) decides that the lien of a judgment does not extend to an equity, while the other one from the supreme court of the United States (*Miller v. Sherry*) decides that such lien does not attach at all in the case of a previous conveyance in fraud of creditors.

In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing, is not nor can not, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties.

A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee. And a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. (Or. Gen. L., p. 523; *Bean v. Smith*, 2 Mason, 272; *Rappleye v. International Bank*, *supra*.)

Such a conveyance is not, as has been sometimes supposed, "utterly void," but is only so in a qualified sense. Practically, it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then, not as against a *bona fide* purchaser. (*Bean v. Smith*, *supra*, 274; *Wood v. Mann*, 1 Sum. 509; *Bump on F. C.* 451.)

The operation of the lien of a judgment being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed, by which a creditor may attack a conveyance, fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy, or any other act directed against the specific property. It is the creature of the statute, and can not have effect beyond it. (*In re Boyd*, 4 Saw. 268-270.) By that, its operation

and effect are restrained to the property then owned by the debtor. But the conveyance from Estes to Cole deprived the former of all interest in this property. No judgment against Estes, nor any act of his, could reach it or affect it.

Therefore, when the judgments of these joint creditors were obtained and docketed, the property did not belong to him, and was not for that reason within the operation of their liens. On the contrary, it belonged to Cole, qualified by the right of the creditors in the manner and time prescribed by law, to subject it to the payment of their debts.

In the suit against Cole to set aside this fraudulent conveyance, the assignee represented the creditors. (*Bradshaw v. Klein*, 2 Biss. 20.)

It is also claimed by the assignee, that the fund obtained by that suit—the proceeds arising from the sale of the property—is equitable assets, and should be distributed equally among the creditors, citing *Silk v. Prime* and notes, 2 Lead. Cas. Eq. 82; *Benton v. Le Roy*, 4 Johns. Ch. 551. But this distribution was subject to any specific legal lien or priority that might exist in favor of any creditor. (*Purdy v. Doyle*, 1 Paige Ch. 558; *Codwise v. Gelston*, 10 Johns. 522.)

In this last case, Chancellor Kent says: “If a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in to avail themselves of it, the rule of equity then is, that they shall be paid in *pari passu*, or upon a footing of equality. But when the law gives priority, equity will not destroy it, and especially where legal assets are created by statute, they remain so, though the creditors be obliged to go into equity for assistance.”

But it is not necessary to invoke the doctrine of equity in this case, as the bankrupt act preserves all legal liens, and furnishes a certain and just rule for the distribution of the assets of a partnership and the members thereof. (R. S., secs. 5075, 5121.) By this rule, the property of the partnership is to be first applied to the payment of partnership debts, and the property of each member thereof to the payment of his individual debts.

Whether the proper application of this rule would exclude

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the lien of a judgment obtained against the members of the firm for a partnership debt, from the property of the individual partner, as contended by counsel for the assignee, it is not necessary now to consider.

Having arrived at the conclusion, that none of the judgments in this case was a lien upon the property in question, the proceeds of the sale are individual assets, and under the bankrupt act, must be first applied to the payment of Estes' individual debts; and it is so ordered.

Upon an appeal to the circuit court, Mr. Justice Field presiding, this decree was affirmed, on December 13, 1880.

Mr. Justice FIELD. In July, 1877, Levi Estes and Charles M. Carter, as partners composing the firm of Estes & Carter, and as individuals, were adjudged bankrupts by the district court of Oregon. In May of the previous year, 1876, Estes was the owner of an undivided half interest in certain real property in the city of Portland, in that state; and, being at the time insolvent, he conveyed the same, subject to a mortgage thereon, to one Cole, with intent to hinder, delay, and defraud his creditors. Subsequently to this conveyance, several judgments were obtained by different parties against the bankrupts as partners; and one judgment was obtained against Estes individually, all of which were duly docketed in the county where the property was situated, so as to become a lien upon it, if, after the conveyance, it could be subject to the lien of the judgments.

In December, 1879, the conveyance was set aside by the decree of this court in a suit brought by the assignee of the bankrupts; and afterwards the property was sold by him, free from all liens except that of the mortgage mentioned, and the proceeds he now holds for distribution.

Of the claims proved against the estate of the bankrupts, over eight thousand dollars is against Levi Estes individually, of which eight hundred and thirty-six dollars is in judgment; and over eleven thousand dollars is against the bankrupts as partners, of which four thousand three hundred and sixty-one dollars is in judgments. The assets in

the hands of the assignee for distribution are about six thousand dollars, all of which have been derived from the separate property of Estes.

The question for decision is, whether the judgment creditors acquired by their judgments a lien upon the real property of Estes, so as to entitle them to these assets in preference to the other creditors.

The district court held that they did not acquire a lien on the property by their judgments, and that the assets must be applied to the payment of the claims against Estes' individual estate, without regard to their asserted liens. The judgment creditors have, therefore, brought the case to the circuit court on writ of error.

The statute of Oregon concerning fraudulent conveyances is similar to that of other states, and is taken substantially from section 5 of 13 Elizabeth. It provides, among other things, that every conveyance of any estate in lands, "made with intent to hinder, delay, or defraud creditors of their lawful demands, * * * as against the person so hindered, delayed, or defrauded, shall be void."

The conveyance in such case, notwithstanding this strong language, is only voidable on the election of the creditor, and is only made void by proceedings to set it aside, or to defeat its operation. It is good as between the parties, and passes the estate. If a third party acquire the property from the fraudulent grantee for value without notice, he will hold the property even as against the defrauded creditor. All of which shows that the property after the conveyance can not, in strictness, be said to belong to the grantor, and as such to fall at once under the lien of judgment recovered against him.

The fraudulent conveyance may be defeated by a direct proceeding to set it aside, or in some states by the judgment creditor proceeding by levy upon and sale of the property, he thus asserting the invalidity of the conveyance as against him, under the statute. When this latter proceeding is authorized, it is only from the date of the levy that the creditor's right to the property, as against the fraudulent grantee, can be deemed to attach.

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But how far and under what circumstances judgments shall be a lien upon property of the debtor fraudulently conveyed to others, is a matter of local law. When that is ascertained, efficacy will be given to it in the courts of the United States. In some states it is said that a judgment is a lien upon the property of a debtor fraudulently transferred. When that is the case, the position, for which the judgment creditors here contend, will be maintained, but in Oregon the rule we have stated is the one which prevails, and that is, that until the conveyance is set aside, a mere equitable right remains in the creditor, which he may or may not enforce, and until he does enforce it, the estate is in the grantee, and upon it a judgment creditor acquires no lien by his judgment.

The decree of the district court is therefore affirmed.

EUREKA CONSOLIDATED MINING CO. v. RICHMOND
MINING CO.

CIRCUIT COURT, DISTRICT OF NEVADA.

JUNE 14, 1880.

REMOVAL.—A suit brought in a court of the state of Nevada by a citizen of California against a citizen of England may be removed into the circuit court of the United States under the act of March 3, 1875.

Before HILLYER, District Judge.

MOTION to remand.

Crittenden Thornton, for the motion.

John Garber, opposed.

HILLYER, J. This is a motion to remand. The plaintiff is a corporation of California, and the defendant an English corporation doing business in Nevada. The sole question is whether the character of the parties is such as gives this court jurisdiction. On both sides it has been assumed, and correctly no doubt, that the case stands precisely as if the plaintiff and defendant were natural persons. The de-

fendant makes this motion upon the ground that neither party is a citizen of the state in which the suit is brought. It is argued that notwithstanding the omission from the act of 1875 of the words in the act of 1789, confining the jurisdiction to suits "brought by a citizen of the state in which the suit is brought" (1 Stat. 79), the meaning of the act of 1875 is in this respect identical with that of 1789 and subsequent statutes prior to that of 1875 prescribing the same restriction. The question, upon examination, appears to me to be entirely free from difficulty. Under the constitution the judicial power extends to controversies "between a state or citizens thereof, and foreign states, citizens, or subjects," using the word foreign in its ordinary meaning of not native. There is nothing here limiting or qualifying the power in the enumerated cases. It is only in the acts of congress passed subsequently that the restrictions are found. So long as it kept within constitutional bounds, congress might place limitations on the jurisdiction of the circuit courts, and in like manner it had power to take them away. This it has done in the act of 1875, which, so far as it bears on the present case, is in the language of the constitution, and gives the circuit courts jurisdiction, and the right of removal thereto, of suits wherever there is "a controversy between citizens of a state and foreign states, citizens, or subjects." There is nothing said about the suit being brought in the state where the "citizens of a state" in a given case reside. Nor is there any warrant for any qualification of that sort. All that is necessary, under this clause, is that one party shall be a citizen or subject of a foreign state, and the other a citizen of a state. The plaintiff properly sued the defendant in a court of this state, and afterwards, it being a citizen of "a state" (California), and the defendant being a foreign citizen or subject (of Great Britain), transferred the suit to this court, that being the very case made by the statute in which a removal is authorized. It is said no case in point can be found, that is, a case between a citizen of a state, a member of the union, and a citizen of a foreign state. But there is

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Points decided.

a universal concurrence of opinion that since the act of 1875 it is no longer necessary in suits between citizens of different states that either shall be a citizen of the state in which the suit is brought. (Dill. on Removal, 26; *Cook v. Ford*, 16 Am. L. Reg. 417; *Peterson v. Chapman*, 13 Bl. 399.)

It is impossible to distinguish the present case from these in principle. In both instances the language conferring the jurisdiction is general, in one case extending the judicial power to controversies between citizens of different states, and in the other to those between a citizen of a state and a citizen of a foreign state. It is said that the fundamental ground upon which jurisdiction, by reason of citizenship of parties, rests, is the fear of local prejudice, and that this can not possibly exist in a case like the present. A sufficient answer to this, it seems to me, is that where the constitution and the law give the jurisdiction in plain language it is unprofitable to look farther for the legislator's motive. But counsel is in error when he assumes that the fear of local prejudice was the only ground for the grant of jurisdiction. The case of aliens stands among another class, namely, those involving the peace of the union. Mr. Hamilton shows in *The Federalist* (No. 80) why the judicial power was extended over cases in which aliens were parties, even when the case depended wholly upon the *lex loci*. It was undoubtedly the intention to refer all cases in which aliens were parties to the national tribunals. (P. 555.)

Motion denied.

MARY E. BARRETT v. XARIFA J. FAILING ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 27, 1880.

1. CODE OF PROCEDURE.—A provision in a code of procedure giving the husband or wife, "in all cases," a certain interest in the lands of the other, as an incident to and consequent upon a decree of divorce being given at the suit of either, is not to be construed as a general statute regulating the right of the husband and wife in the lands of each other generally, and in any event, but as confined to those cases in which such decree is given under such code of procedure, and in the courts of the state.

Opinion of the Court—Deady, J.

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2. DECREE OF DIVORCE.—Section 495 of the Or. Code of C. P. provides, that, “in all cases” of divorce, the prevailing party shall be entitled to one third of the lands then owned by the other: *Held*, that the right is conferred by the statute, and results wholly from the entry of the decree of divorce, and not from any provision in it to that effect, but that it does not include or affect a decree of divorce given in another state or country.

Before DEADY, District Judge.

Sidney Dell and W. Scott Bebee, for the plaintiff.

William Strong, for the defendant.

DEADY, J. This suit is brought to establish the right of the plaintiff to the undivided one third of the west half of lots 7 and 8 in block 63, in the town of Portland, the same being of the value of two thousand dollars, and for an account of the rents and profits thereof during the past six years. It appears from the bill, that on September 25, 1866, the plaintiff, then a resident and citizen of California, commenced a suit in a court of that state to obtain a divorce from her husband, Charles Barrett, then a resident and citizen of Oregon, and on April 1, 1870, obtained a decree therein, dissolving the bonds of marriage between herself and husband; that at the date of the commencement of said suit, said Barrett was the owner of the premises aforesaid, and that on or about February 4, 1868, he conveyed said premises to his daughter, the defendant, Xarifa J. Failing, with intent to prevent the plaintiff from acquiring any right in the premises by said decree; that at the commencement of said suit for divorce, the plaintiff did not know that said Barrett was the owner of said premises, and that he died shortly after the decree of divorce was obtained; that said Xarifa has been in the possession of said premises for the past six years, and received the rents and profits thereof, amounting to five hundred dollars per annum.

Upon these facts, the plaintiff claims that by the laws of Oregon, and by virtue of the decree aforesaid, she became and was entitled to one third of the premises. This claim is made under section 495 of the Or. Code of C. P., which provides that “whenever a marriage shall be declared

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void or dissolved, the party at whose prayer such decree shall be made, shall, in all cases, be entitled to the undivided one third part in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance, provided for in section 497; and it shall be the duty of the court, in all such cases, to enter a decree in accordance with this provision."

As it originally stood in the code, this section simply provided that upon the dissolution of a marriage, the real property of the parties should be discharged from any claim or interest of the other therein; provided, if the marriage was dissolved on account of the adultery or conviction of a felony of either party, then the innocent party should be entitled, as tenant in dower, or by the curtesy, as the case might be, in the real property of the other, the same as if that other were dead. The statute declared this to be the legal effect and operation of the decree, and it was neither necessary nor proper that the pleadings or decree should allege or contain anything on the subject. The section was amended as it now stands on December 20, 1865, and the purpose of it is manifest; it is to give the prevailing, and so far innocent party in the suit, in all cases, no matter what the cause of divorce, absolutely one third of the other's real property, as a result and effect of the decree dissolving the marriage, instead of mere dower or curtesy in certain cases. But by adding the clause to the amended section requiring the court to make provision in the decree concerning this third, the matter is unnecessarily complicated, and some doubt is raised as to what is the effect of the decree where no such provision is contained in it.

In *Bamford v. Bamford*, 4 Or. 30, it was held that where the complaint and decree in a suit for divorce are silent as to the property of the defendant, the party obtaining the divorce acquires no right in the property of the other. And this conclusion seems to rest mainly upon the assumption that it is necessary to the security and certainty of titles, that a description of the land to be affected by the decree should be contained in it, and therefore the legislature is

presumed to have intended that it should be done. But nothing is gained in this respect by attempting to specify the lands to be affected by the decree. For if you undertake to describe them, there is the chance of mistake or omission, while if nothing is said, the decree affects all the lands of the party in fault, with the certainty of the lien of a docketed judgment. As well object to the lien of a judgment because the property affected by it is not described in it, and depends upon the extrinsic fact of the ownership of the judgment debtor, or the operation of a will by which the testator devises and passes the title of all the property owned by him in the state of Oregon, without naming or describing any particular parcel of it. Besides, there may be a question as to what property does belong to the party against whom the decree is obtained, and, in such case, third persons would be necessary parties to its final determination. But it is neither proper nor convenient that such questions should be litigated in the suit for divorce, or that third persons should be thus made parties to a controversy between the husband and wife in which they have no interest.

In the subsequent case of *Wetmore v. Wetmore*, 5 Or. 469, the court went farther towards sustaining the statute, and held that it was peremptory as to the right of the party obtaining the divorce in the land of the other, and also the duty of the court to make the decree accordingly; but did not decide what effect, if any, the omission to provide for the matter in the decree would have upon such right. However, in my judgment, the amended section, like the original one, gives the right upon the entry of the decree without any mention of it being made therein, and that the clause in the former concerning the nature of the decree to be entered is, so far as this matter is concerned, merely cumulative; and that in no event need there be any allegation or proof concerning the lands to be affected by the decree, but only, if there is a decree for a divorce, that it shall contain a provision to the effect, that the party obtaining it is thereupon and thereby entitled to one third of the real property then owned by the other, whatever it may be.

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If any question should arise as to what property was so owned by such other, it can, as it should, be determined by appropriate proceedings between the parties interested.

If then, the decree of divorce in *Barrett v. Barrett* had been pronounced by a court of this state, in a proceeding under title VII of its code of civil procedure concerning "suits to declare void or dissolve the marriage contract," I should have no hesitancy in holding that this suit could be maintained, unless the ruling in *Bamford v. Bamford*, *supra*, should prevent me.

But counsel for the plaintiff go further, as they must to maintain this bill, and contend that the right conferred by said section 495 on the prevailing party in the lands of the other is given to such party, not only by the mere operation of the statute, and as a result of the decree and not by it, but in all cases of divorce, whether obtained in the courts of this state under its code of procedure or elsewhere; that the declaration in said section 495, "whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made, shall, in all cases, be entitled to the undivided one third part * * * of the whole of the real estate owned by the other at the time of such decree," is a general rule of universal application, like the provision in the statute of descents declaring that whenever any person shall die intestate and seised of real property, it shall descend to certain persons, or that of dower, which declares that the widow of every deceased person shall be entitled to dower in the inheritance of her husband, and cite *Harding et ux. v. Alden*, 9 Me. 140; *De Godey v. Godey*, 39 Cal. 161; and *Whetstone v. Coffee*, 48 Tex. 269.

In Texas and California the civil law is so far in force that property acquired during the marriage, otherwise than by gift, devise, or descent, is common property—that is; it belongs to the matrimonial community, the husband and wife, equally, subject to the right of management on the part of the husband during coverture. The cases cited from these states only decide that when a decree of divorce is declared, and no disposition is made of the community property, the wife may assert her right to her interest in it

in another suit before another court of the same state; and this although the statute of the latter state provided that in case of the dissolution of the marriage by the decree of the court, "the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property." But the question whether a decree of divorce obtained in another state—a foreign decree—comes within the operation of this section 495, so as to affect the title to lands in this state, these cases do not decide.

The case in 9 Maine goes farther, and holds that under the law of that state, which provided generally, that when a divorce was adjudged for the adultery of the husband, the wife should be entitled to dower the same as if he were dead; and that a wife divorced in Rhode Island for the adultery of the husband committed in North Carolina, was entitled to dower in his lands in Maine. The contest in the case was principally as to the validity of the Rhode Island divorce, and assuming that to have been valid, her right to dower was allowed without much consideration, the court being apparently controlled by the fact that the provision was general, "and not limited to divorces decreed within the state."

And so the question of what was the legislative intent in the case of the Oregon statute must be determined mainly upon its own language and circumstances. In this connection, weight must be given to the fact that said section 495 occurs in a code of procedure, and in that division of it which authorizes and regulates the granting of divorces in and by the courts of the state only, and not in a general statute defining or prescribing the rights of husband and wife, as such, in the lands or property of each other.

Although, then, the statute does say, that the prevailing party shall "be entitled" "in all cases" to a third of the other's land, yet the question arises, in what "all cases"? Is it all the cases of divorce brought and determined under this code in the courts of Oregon and for the causes therein prescribed and allowed, or does the phrase include all the cases decided under any code in any country and for any

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Opinion of the Court—Dedy, J.

cause? In my judgment the statute only comprehends all the cases provided for in it and which may be said to arise, or at least be determined under it, and in the courts whose procedure is regulated by it. By the code (section 266), a judgment "in any action" is authorized to be docketed, whereupon it becomes a lien upon the property of the judgment debtor in the county. The phrase "any action" is quite as comprehensive as all actions. But can it be supposed for a moment that, under the circumstances, it includes a judgment given in any other state or country, or that any judgment was in the contemplation of the legislature, other than those authorized and provided for in the code in which the provision occurs?

It may be admitted that the legislature has the power to provide that a decree of divorce, pronounced in the courts of another state, shall have the same effect upon the real property of the parties in this state as if given here, or that a judgment given in a foreign forum might be docketed here with the same effect as if given in the courts of the state.

But it is not to be inferred that the legislature intended to make any such extraordinary provisions, from the bare use of language which is fairly satisfied when confined to domestic decrees and judgments, and only occurs in a code of procedure made to regulate judicial proceedings in the courts of the state. The results which would follow from allowing a decree of divorce in another state to have the same effect upon the property of either within this state as if given here are sufficiently serious to prevent such a conclusion, unless the statute was plain and peremptory to that effect.

Divorces may be and are allowed in other states and countries for causes and under circumstances not allowed here, and contrary to the public policy and morals of the state. But if section 495 is taken absolutely and construed to include all cases of a decree for divorce given as well without the state as within it, then such divorces, although granted contrary to the laws and policy of this state, would nevertheless be allowed an extraterritorial force and effect

Points decided.

[August,

within it, and often, as in this case, against the property of its own citizens.

Aid is sought to be given to the claim of the plaintiff by invoking the rule prescribed in article IV of the national constitution and the act of congress passed in pursuance thereof, of May 26, 1790 (1 Stat. 122), which in effect declares that the judgments of each state shall have the same credit and effect in every other state that they have in the state where they were given.

But it is admitted that the decree of the California court is valid and effectual here as a decree of divorce, and that is all the effect it has in that state. The law of California, unlike that of this state, does not provide that a decree of divorce shall work a transfer or forfeiture of one third of the real property of the one party to the other, and if it did it could have no extraterritorial effect, but would be confined in its operation to the property of the parties within that state.

The plaintiff's decree of divorce, although valid and effectual, as such can have no operation or effect upon real property in this state, except with its consent declared in its laws. If this decree was within the purview of the provision in section 495, I think this suit could be maintained. But, in my judgment, that not being the case, the demurrer to the bill must be sustained; and it is so ordered.

A. B. ELFELT ET AL. v. W. STEINHART ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 2, 1880.

1. GIBBONS' PATENT FOR IMPROVEMENT IN PANTALOONS, No. 178,287, dated June 6, 1876, sustained.
2. GIBBONS' PATENT FOR IMPROVEMENTS IN POCKETS OF WEARING APPAREL, No. 178,428, dated June 6, 1876, construed, and held to be a patent for a combination.
3. THE STITCHED PERPENDICULAR PARALLEL LINES, extending above and below the pocket openings, are an element in the combination of said patent; and a pocket opening made without this element, or an equivalent, does not infringe either claim of the patent.

1880.]

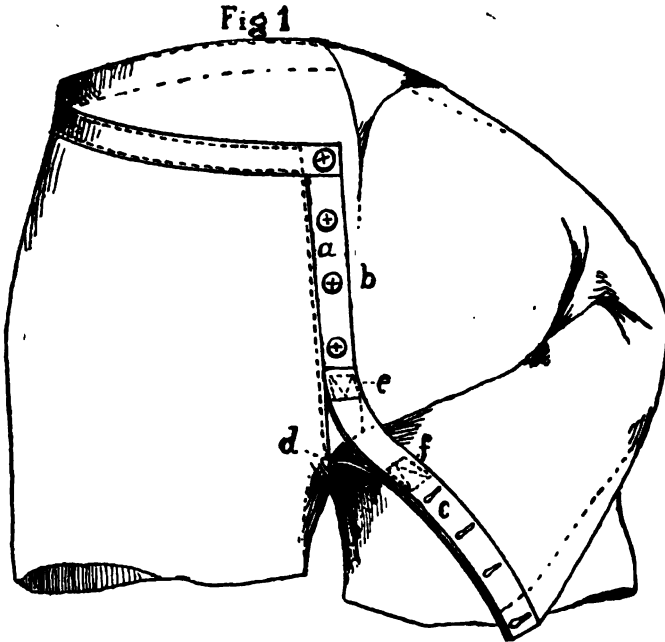
Statement of Facts.

4. THE PENA PATENT does not contain the stitched perpendicular parallel lines extending above and below the pocket opening, and as it does not contain this element of the combination in Gibbons' patent, it is not an infringement.

Before SAWYER, Circuit Judge.

THIS was a bill in equity to restrain the infringement of two patents, dated June 6, 1876, issued to Rodman Gibbons for improvements in the manufacture of pantaloons and other garments, the first No. 178,287, and the other No. 178,428. The following are so much of the specifications and drawings of said several patents as are necessary to illustrate the points decided.

DRAWING OF IMPROVEMENT IN PATENT No. 178,287.

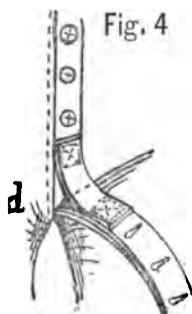


Extract from specifications in No. 178,287:

“My invention relates to a fastening for the crotch of the fly of pantaloons or similar garments; and it consists in bridging said crotch with a check-piece of cloth or other inelastic pliable material, as hereinafter fully described. The object of this invention is to prevent that tension at

the crotch ordinarily produced either by continued use of the garment, or by any undue strain caused by the assumption by the wearer of any posture of the body, or by the removal of the garment, calculated to produce such an effect. The said improvement is applicable to all descriptions of pantaloons and garments of a similar character, its application to the garment adding greatly to its durability, by preventing the stretch of the cloth or stitching at the crotch. To enable persons skilled in the art of manufacturing the garments to which my invention is adaptable, I describe the same as follows, referring to the annexed drawing.

"Figure 1 is a view of the upper part of a pair of pantaloons, the front of the fly being turned down, so as to show the application of the improvement. Figure 4 shows a modification in construction.



In figure 1, the button strip of the fly is represented by *a*, and the buttons by *b*. The button-hole strip is indicated by *c*, and between the button-holes it is stitched to the front of the garment in the ordinary way. The lower end of the button-hole strip does not extend down and fasten into the crotch *d*, as in the common construction of pantaloons, but bridges over the crotch, being securely stitched at *e* to the button strip *a*. The button-hole strip is also firmly secured at *f* below the lower button-hole. Figure 4 shows, instead of the preferred construction exhibited in the other figures, a separate piece of cloth serving as the bridge or check piece. This construction I deem to be within the scope of my invention. My improvement, as seen in the manner preferred by me, adds nothing to the cost of the garment, but rather cheapens its manufacture, by causing the attachment of the lower end of the button-hole strip to be made at a point more easily reached than that at which the connection is ordinarily made.

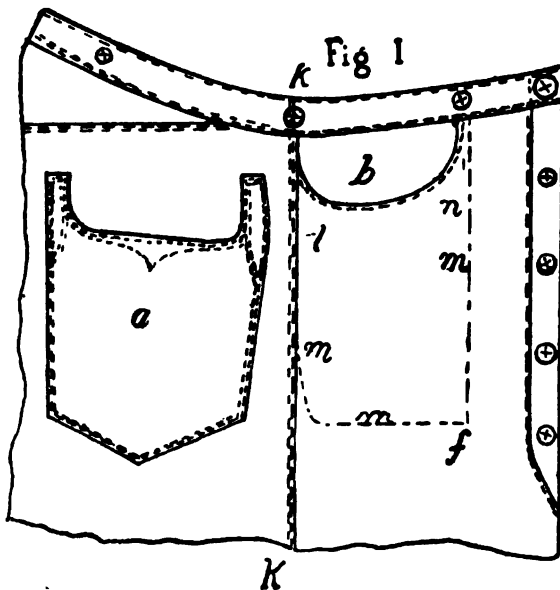
"Having described my invention, what I claim as new, and wish to secure by letters patent of the United States,

1890.]

Statement of Facts.

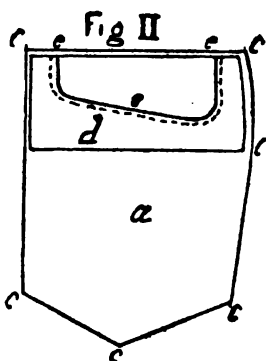
is, in combination with the fly of pantaloons or similar garments, an inelastic bridge or check-piece, arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, is received by said bridge or check-piece, instead of at the angle of the crotch itself."

DRAWINGS AND SPECIFICATIONS OF PATENT No. 178,428.

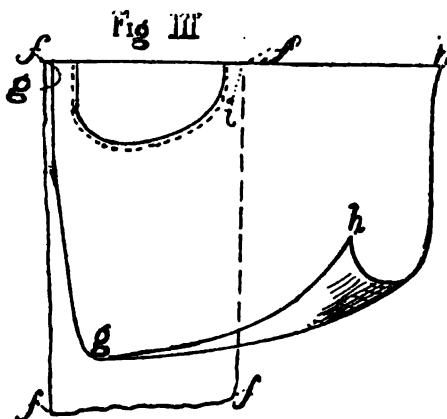


"My invention consists of making a pocket for and in wearing apparel, the opening of which pocket is without corners, curved upward to the perpendicular at both sides thereof, and stitched longitudinally in the direction of the strain to which said pocket is subjected in common use. The objects of this invention are to avoid the transverse strain upon the stitching which should support a pocket; to dispense with cross-tacks, corner-patches, gussets, and metallic fastenings as pocket-supporters; and to secure strength and durability in pockets by a neat, simple, and cheap device. The said improvement is applicable to and in the pockets of all articles of suitable wearing apparel, and admits, without change in the nature of my invention, of various shapes and fashionings of pocket openings.

"To enable persons skilled in the art of manufacturing wearing apparel to utilize the invention, I describe the same as follows, referring to the annexed drawing. Figures 1 to 7 represent various forms of said improvement, and the modes of constructing the same. In figure 1, *a* represents an outside pocket, and *b* an inside pocket, particularly adaptable to overalls, the dots in said figure indicating stitching. In figure 2 the



manner of forming the outside or hip pocket is shown. The outside shape of the piece forming said pocket is seen at *c c c c c c*. By *d* is represented a smaller piece, laid face to face upon the other, the form of the pocket opening having been marked upon it, as per dotted line. The two pieces are then stitched, as per said dotted line, and both thicknesses of stuff cut out, as per solid line *e e e*, say, a quarter of an inch from the seam. The piece *d* is then turned over and inward close upon said seam forming the rim of the pocket opening, which is then stitched, as shown in figure 1. The outer edges *c c c c c c* are then turned under, and the



pocket is sewed upon the garment, as also shown in figure 1 by *a*.

"Figure 3 shows the detail of front pocket *b* in figure 1. By *f f f f f f* is represented a section of the right-side front *f* of the overall pattern, as shown in figure 1. A piece of cloth, *g h h*, is laid face to face upon the other, as in

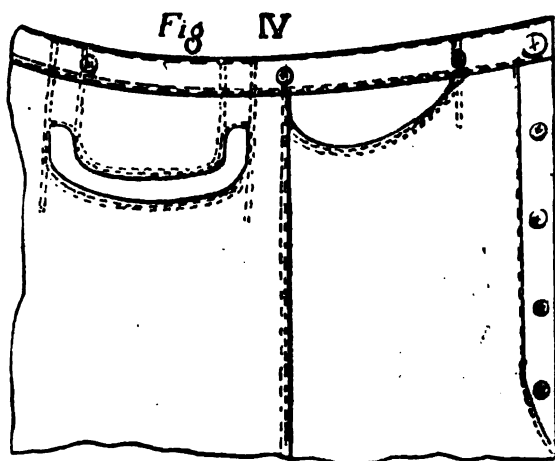
figure 2, except that the top edges of the two pieces should be even, the pattern of the pocket, indicated by the dotted

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Statement of Facts.

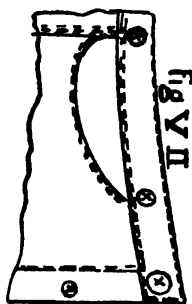
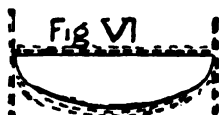
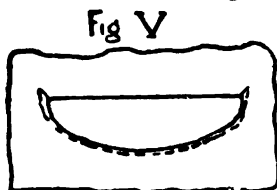
lines, having been previously marked upon it, as in the other case. The sewing is then done as per said dotted line, the stuff cut out as before, the piece turned over and inward close upon the seam, and the rim stitched, as shown in figure 1. The piece *g g h h* is then folded at *i*, so that the edge *h h* shall be made to coincide with the edge *g g*, the fold thus forming the back face of pocket *b*, as shown in figure 1. There are two or more thicknesses of material brought together at *g g*, and in constructing the garment they are caught in the side seam *k k* as far down as *l*, from about which point the pocket is allowed to hang, as shown by the broken and dotted line marked *m*. A perpendicular line or lines of stitching are made downward to *n*, figure 1.

"Figures 4, 5, 6, and 7 are modifications in the shape of the pockets, the construction being substantially the same as that hereinbefore de-



scribed. Figures 5 and 6 show side pockets suited to coats, etc., the solid lines in figure 5 showing the cut in the cloth, and the dotted lines the pattern of the pocket opening, and the first seam in the facing, as in the other cases.

Figure 6 shows the stitching of the fin-



Statement of Facts.

[August,

ished pocket opening (shown incomplete in figure 5), which may be made with or without lappet.

"The greatest strain and wear and tear upon a pocket opening are upon that side thereof upon which the hand bears the hardest when entering the pocket. Therefore, the purposes of this invention may be partially fulfilled by curving that side alone of the pocket opening, as shown in figure 7; but I prefer to curve both sides, as hereinbefore described. The waistband, as seen in figure 1, overlaps, and the buttons are incidentally made additional supports to the pockets.

"I am aware that the so-called crescent-shaped pocket, in common use, is often made to curve upward at the sides of the opening; but such pocket openings are invariably made dependent for support upon cross-tacks, patches, or gussets; and there is always a transverse strain upon the stitching that supports said pocket, all of which appliances are obviated by this invention.

"Having described my invention, what I claim as new, and wish to secure by letters patent of the United States, is:

1. In combination with pantaloons or other articles of wearing apparel, a pocket, the sides of whose opening are curved upward to the perpendicular, and stitched to the pocket and garment in parallel perpendicular lines extending above and below the mouth of the pocket opening, whereby the strain to which both the pocket opening and pocket are subjected in common use is resisted by vertical stitching, substantially as herein described.
2. In combination with a pocket, the sides of which curve to the perpendicular, a line or lines of stitching coinciding and parallel with said sides of the pocket pattern, and intersecting the upper extremity of the curve of the pocket rim, substantially as and for the purposes herein specified.

"In testimony whereof I have hereto subscribed my name this twenty-second day of May, in the year of our Lord 1876."

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Statement of Facts.

DRAWINGS AND SPECIFICATIONS OF THE PENA PATENT, No. 183,863.

"My invention relates to improvements in clothing; and consists, more particularly, first, in an improved method of constructing the pockets of pants, coats, and vests; second, in an improved waistband for pants and overalls; and, third, in the manner of cutting and applying the fly of the front opening of pants and overalls, all of my said improvements being intended to strengthen the parts and render the articles of clothing more durable. Referring to the accompanying drawing, figure 1 is a pair of overalls. Figures 2 and 3 represent pieces of cloth with pocket openings. Figure 4 is a side view of top of pants, showing the form of yoke. Figure 5 is a section from the edge of the pocket.

A represents a pair of pants or overalls. The first place at which a pocket gives way is the corner or angle at each end of the pocket opening, because the strain

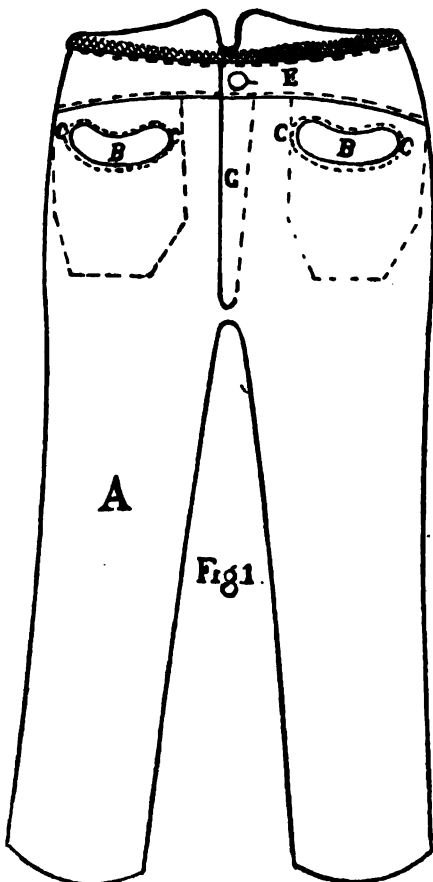
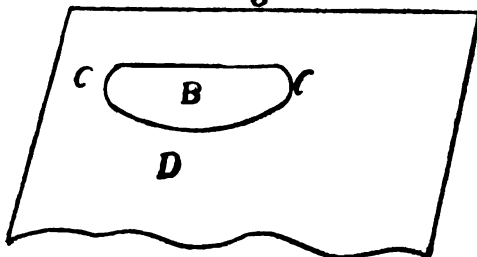
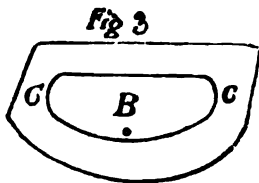
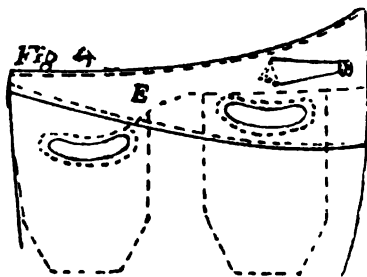


Fig. 2.





upon the pocket concentrates at these two points, and, as pockets are usually made by uniting two or more pieces of cloth, the corners are only held together by stitches, or possibly by some patent fastening device, so that no substantial resistance is obtained except the limited portions of cloth held by the fastening device or stitches.



"My improvement consists in forming the pockets without corners or angles to concentrate and receive the strain, consequently avoiding the necessity of using rivets or other re-enforce-



ment for securing the corners. To do this I cut or punch out the pocket opening B, as represented, and the ends C C of this opening have rounding or circular lines, thus providing an oval or curved segmental opening. I then take another piece of cloth, D, and cut an opening in it which exactly corresponds with the pocket opening B, and place it on the outside of the cloth in which the pocket opening is made, so that the openings will register with each other. I then stitch the edges together all around the opening, after which I turn the piece of cloth D through and to the inside of the pocket, and again stitch it down a short distance from the edge of the opening, thus providing four thicknesses of material. Any strain upon the pocket or lower edge of the opening will then be received by the strength of four thicknesses of cloth along the entire rounded or circular portion at each end of the pocket, thus giving ample strength of material to resist any ordinary strain that may come upon the pocket. Instead of an ordinary waistband, as usually employed in the manufacture of pants, I construct a yoke, E, which extends from the front around upon each side of the pants to the back, where the two yokes are united. Each yoke extends downward

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Opinion of the Court—Sawyer, C. J.

and backward and is made in a single piece of goods, thus obviating the necessity of piecing out the portion around the pockets, and as it widens toward the back it gives the wearer greater comfort, and a better fit. I thus provide valuable improvements in clothing, and at the same time simplify their manufacture.

“Having thus described my invention, what I claim, and desire to secure by letters patent, is: 1. A garment provided with elongated pocket openings, cut out of its main body and having rounded ends, as set forth. 2. The method of re-enforcing pockets, consisting in laying on the outside of the garment a re-enforce, D, having an opening coinciding with the pocket opening, stitching the two together around the edge of the pocket opening, and then turning the re-enforce through the pocket opening to the inside, and stitching down with one or more rows of stitches, as set forth. 3. The yoke waistband E, gradually widened from front to rear, substantially as described.”

Wheaton & Scrivener, for complainants.

Estee & Boall, for defendants.

SAWYER, Circuit Judge. This is an action for the infringement of two United States patents. The first is patent No. 178,287, for improvement in pantaloons, dated June 6, 1876. As to that patent I find the plaintiff entitled to the decree he asks for, establishing his right to it. And, as there was an infringement, if he desires it I will make an order of reference to take testimony as to the profits, etc., though I understand that the parties on being notified ceased to use this patent, and I do not know whether or not there is any object in making such a reference. With respect to the other patent, No. 178,423, I had more difficulty. There was a great deal of testimony taken in this case, which I have examined very carefully, and I have come to the conclusion which I indicated to counsel the other day when I called their attention to the difficult point. Both these patents relate to the manufacture of pantaloons, overalls, and garments of like character and description,

and this one relates particularly to pockets in overalls, etc. The patentee says:

“My invention consists in making a pocket for and in wearing apparel, the opening of which pocket is without corners, curved upward to the perpendicular at both sides thereof, and stitched longitudinally in the direction of the strain to which said pocket is subjected in common use. The objects of this invention are to avoid the transverse strain upon the stitching which should support a pocket; to dispense with cross-tacks, corner patches, gussets, and metallic fastenings as pocket supporters; and to secure strength and durability in pockets by a neat, simple, and cheap device.”

He goes on to describe the mode of making two kinds of pockets, one of which has been called the patch-pocket, and the other the inside, or hanging pocket. After describing the mode of manufacturing the patch-pocket, he proceeds to describe the manner of making the other pocket, and winds up by saying: “A perpendicular line or lines of stitching are made downward to *n*, figure 1.” After giving the description, he states the claim, or rather the two claims, of the patent. The first is: “In combination with pantaloons, or other articles of wearing apparel, a pocket, the sides of whose opening are curved upward to the perpendicular, and stitched to the pocket and garment in parallel perpendicular lines extending above and below the mouth of the pocket opening, whereby the strain to which both the pocket opening and pocket are subjected, in common use, is resisted by vertical stitching, substantially as herein described.” One of the elements, and apparently in the opinion of the inventor an important element, in that combination, is the stitching of the pocket “in parallel perpendicular lines extending above and below the mouth of the pocket opening.” The difficulty is in understanding what particular lines are referred to in that portion of the claim, because those lines are an element of the combination; and it is a combination patent. So that a garment not having that element of the combination would not be an infringement. The second claim is as follows: “In combination with a

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pocket, the sides of which curve to the perpendicular, a line or lines of stitching coinciding and parallel with said sides of the pocket pattern, and intersecting the upper extremity of the curve of the pocket rim, substantially as and for the purposes herein specified."

The patentee himself, and the experts who have testified on that side, insist that that claim applies only to the patch-pocket, and the parallel lines of stitching are then shown in figure 1, pocket *a*, and it is not seriously claimed that there is any infringement of that claim. It is insisted, however, that the perpendicular parallel lines mentioned in the first claim are the lines stitched around the circular form and rim of the pocket. But there is a difficulty in so construing that language and still make it conform with the claim in the patent. It must be construed as the patent was obtained, when the claim was drawn and adopted, and not with reference to subsequent modes of manufacture in that particular; and it would be necessary to strain the construction in order to adopt that view. I am unable to see that those lines correspond with the description. The pocket opening is of a circular form, curving up to the perpendicular, and those lines follow around the edge of the rim to the opening, and are not perpendicular in any part, while the claim calls for "parallel perpendicular lines, extending above and below the pocket opening."

In this patent there are seven different figures, some showing the modes of making the pocket, and others showing the pocket completed, with all the side stitching. There are six completed pockets shown here, and every one of them has parallel perpendicular lines, which correspond to the lines mentioned in the close of the description of the mode of making the inside hanging pockets shown in figure 1, letter *b*. These lines are perpendicular, extending above and below the mouth of the pocket opening, and they stitch the pocket to the garment, and are stitched longitudinally in the direction of the strain to which the pocket is subjected. They fully and accurately fill the description of the parallel perpendicular lines in the first claim in the patent. These lines are found on each side of all the pockets that

Opinion of the Court—Sawyer, C. J.

[August,

are completed. The line is perpendicular, and extends above and below the mouth of the pocket opening, a double line of stitching affording resistance to the strain in a vertical direction with the line of stitching. That line seems to have been ignored by the experts for some reason, but those lines are found in all the finished pockets, and in my judgment are the lines referred to in this claim. They follow the description exactly, and perform the office indicated, and the other lines do not, and cannot without a strained construction be brought within the description. There is only a single point where they touch the perpendicular, and they do not extend above and below the mouth of the pocket opening.

I think those experts are also mistaken as to the second claim. I believe the same parallel lines are referred to in both claims. The Pena patent pocket is the pocket claimed to be an infringement, but in that those parallel lines are dispensed with, and the stitching follows around on a circle, and goes entirely around the ellipsis like Gibbons', without the perpendicular lines extending above and below the pocket opening, and the strain is distributed by the curve. I am aware that the form here described in Pena's patent is elliptical, and intended to resist a transverse strain by distributing it around the circle, but Gibbons does not claim a crescent-shaped pocket as new, nor in any way, except as one element in his combination. But there is another element—the stitching in parallel perpendicular lines above and below the pocket opening, resisting the strain in the line of the stitching, and that element is wanting in the garment shown here in the Pena patent.

This subject has required considerable study. There was a great deal of testimony, which occupied nearly a week to read through, but I have carefully examined it, and have come to the conclusion that there has been no infringement of any claim in the patent. If there has been any infringement at all it was in the use of the Pena patent, and under the first claim. It may be that there might have been something patentable by omitting that one element in the

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Points decided.

combination, but if that is dispensed with there is no infringement under the claim of the patent as made.

Let a decree be entered for the complainant on the first patent, and for the defendant on the second patent, No. 178,428, and as the complainant succeeds as to one patent, and is defeated as to the other, I suppose it will be fair that neither party shall recover costs.

Mr. Wheaton. Upon the question of the infringement of the first patent, does your honor find that there was any anticipation?

The COURT. I do not think there was any anticipation of that patent. The pocket claimed most confidently as an anticipation is the one made under the Adams patent, but the garment put in evidence was not made in accordance with the Adams patent at all, and I am not satisfied that it was made before the invention of Gibbons was brought to the defendant's attention. I am not satisfied that the extra stitching was put on before the discovery of Gibbons. I put the decision simply upon the ground that there is no infringement, according to my construction, of the first claim of Gibbons' second patent. He has put one element in the claim which is not found in the Pena patent, that is, the parallel perpendicular lines of stitching, extending above and below the mouth of the pocket opening, resisting the strain in the direction of the line of stitching.

RODMAN M. PRICE v. SQUIRE P. DEWEY.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

AUGUST 30, 1880.

1. *RES ADJUDICATA.*—Where in an action at law the plaintiff alleges a conspiracy among sundry parties, defendants to the action, by means of which a large amount of real estate of the plaintiff has been fraudulently sold, and the proceeds appropriated by the alleged conspirators; and upon issues taken upon all the allegations of the complaint, a trial is had and all the issues found in favor of the defendants, and final judgment entered upon the verdict, the matters so in issue, found, and adjudged, are *res adjudicata*, and conclusive of the rights of the parties.

Opinion of the Court—Sawyer, C. J.

[August,

2. **SAME.**—Where the complainant in a bill in equity alleges matters before set up and determined in an action at law, as stated in the last head-note, and prays an account of the proceeds of the real estate alleged to have been fraudulently disposed of, and a decree for the amount, a plea setting up the former adjudication is a valid plea in bar to the bill.
3. **SAME.**—The fact that at the time of the commencement of the former action, the defendants had not disposed of all the real estate, the title to which they had acquired by means of the alleged fraudulent practices, does not affect the conclusiveness of the prior adjudication.
4. **SAME—SUBSEQUENTLY DISCOVERED EVIDENCE.**—Nor does the fact that the complainant commenced and tried the former action before he discovered, or obtained all the evidence that he claims to have since found to establish the alleged fraudulent acts—the said evidence being matters of public record, or otherwise open to discovery upon diligent inquiry—affect the conclusiveness of the determination.

Before SAWYER, Circuit Judge.

THIS was a bill in equity seeking an account of the proceeds of a large amount of real estate disposed of by the former real estate firm of Payne & Dewey, the title to which real estate was alleged to have been obtained through fraud from the complainant. The bill was filed against Dewey as surviving partner. There was a plea in bar filed which set up a former adjudication in an action at law in the state of New York brought by the complainant against Payne & Dewey, and other parties charged with conspiracy with them, in which the same facts were alleged as the ground of action as are alleged in the bill in this suit, and in which there was a verdict and judgment in favor of Payne & Dewey.

H. E. Highton, for complainant.

Doyle & Barber, for defendant.

SAWYER, Circuit Judge. This is a bill in equity filed by Rodman M. Price against Squire P. Dewey, as the surviving partner of a former real estate firm, Payne & Dewey. It alleges, in substance, that there was a fraudulent conspiracy between Rodman M. Price's agents and Payne & Dewey (Dewey being the surviving partner) to transfer and get possession of a large amount of complainant's real property in San Francisco without any consideration; that no payments were in fact made; that although there was a

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check for some sixty thousand dollars given, it was only given temporarily, and until the parties could raise from the sale of the property sufficient money to pay the amount; and was but a nominal consideration. Complainant seeks an account from Mr. Dewey, as surviving partner, of the proceeds of the sales of that property.

The defendant files a plea in bar in which it is in substance alleged, that these same matters were set up in an action brought by Rodman M. Price, against Payne & Dewey, and his said agents Keyes and Scott in the city of New York in the year 1857, wherein he alleged the same facts; that the case was tried by a jury who found for the defendants, and that a judgment was rendered by the court giving effect to that verdict, which remains still unreversed and in full force; so that the matter has been already adjudged between the parties. It is insisted, on the other side, that the present bill shows a different state of facts from that set up in the New York suit, and this claim is supported on two theories, viz.: 1. That the accounts of the transactions were not closed until 1861, long after the commencement of the New York suit; and, 2. That the lands conveyed to Payne & Dewey in pursuance of the conspiracy were conveyed without consideration; so that though an apparent title passed to the grantees, which enabled them to convey to purchasers, which they did, yet as between the complainant and the defendant, the title did not pass, and he is, therefore, entitled to an account of the proceeds.

I have compared the complaint in the action in New York with the bill in this case, and analyzed them carefully. In my judgment, the cause of action set up in the New York complaint is the same as that alleged in the present bill. The latter consists merely of an amplification of the allegations of the former, with some additional circumstances, and evidential facts. But the *gravamen* of the bill is precisely the same as that of the complaint in New York. It is contended that the New York suit having been at law, and this being a bill in equity, and the relief sought being different, there is no identity between them. But it makes

no difference, if the exact facts have been determined and adjudged, whether it took place in an action at law, or a suit in equity. If the facts were determined, the determination was final. It is *res adjudicata*, and conclusive. Under the practice of New York, too, there is no distinction between law and equity proceedings. All distinctions as to forms of actions are abolished. If the party sets out the facts which constitute the cause of action, he is entitled to such relief as they justify, whether under the old system it would be an action at law, or a suit in equity.

In the case in New York, all the facts, which constituted this alleged fraudulent conspiracy of Payne & Dewey, were set out, and distinctly averred; and if they were true as stated in the complaint, they would have entitled the party to relief. He did in fact seek damages. He alleged that immediately after the transfer of the property enough of it was sold to realize three hundred thousand dollars. It was alleged that the nominal consideration was one hundred and thirty thousand dollars, or one hundred and thirty-five thousand dollars, but that the defendants, Payne & Dewey, immediately sold enough to realize three hundred thousand dollars. The plaintiff asked a judgment for damages, it is true. But he alleged that the property was worth half a million of dollars, and that he had sustained damages to that amount—the whole value of the property. So, also, the facts alleged in that complaint justified an account. All that was wanted was a mere change in the form of the prayer. But even that was not necessary in New York, because the defendant appeared in the action, and answered; and by a provision of the code of procedure of that state, when a defendant appears and answers, any relief may be granted that is properly embraced within the issues. The fact that the plaintiff chose to demand damages, instead of a decree for an account, does not affect the transaction. If he had recovered, it would have, undoubtedly, concluded the present action. The same result should follow in the contrary alternative. The fact that the transactions were not closed until long after that suit was brought does not affect the question, because, if he is entitled to an account at

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all, it is an account of the proceeds of that property, and for the reason that the property was his. If he had maintained his action at the time he brought it in New York, he would have been entitled to an account of the proceeds of the property already sold, if he had asked it, and a reconveyance of the unsold remainder. Or, if he preferred to recover damages, he would have recovered at least the full value of all the property lost by the acts complained of; so that the fact that sales were made by the parties fraudulently obtaining the title after the commencement of that suit does not affect the question. He could have got full relief at that time. As I look at it, there could have been no verdict and judgment in favor of Payne & Dewey at that time under the allegations of the complaint, and the issues made by the answer, without finding and adjudging the issue as to the fraudulent transfer of the property in their favor. That was the basis and *gravamen* of the action; and it is the same in this suit. In my judgment the plea sets up a good defense. Undoubtedly, the bill states an outrageous case, provided its allegations are true. If the plaintiff failed to introduce all his testimony in the New York case, or brought this action before he obtained all his testimony, that was either his mistake or misfortune. He was aware, or thought he was aware, of the fraudulent transactions, and chose to bring his action, and rest upon the facts then known to him. He claims that he has discovered other facts since. They are all matters of public record, or public notoriety, and were such at that time. If he neglected his suit, because he had other business which was more important, as seems from this bill to be the case, it was his misfortune, or his choice. At all events, the allegation is that these matters were set up and relief sought in that action. Issue was taken on them, and the issues were found in favor of the defendants, and a judgment rendered on the finding of those issues.

That being so, whether the allegations are true or false, the matter has already been heard, determined, and adjudged according to the facts set up in this plea. The plea, therefore, I think, is good and must be sustained.

ALEXANDER B. GROGAN v. THE TOWN OF HAYWARD.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 6, 1880.

1. DEDICATION OF LAND TO PUBLIC USES.—A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes, by the owner, manifested by some clear declaration of the fact.
2. REVOCATION OF DEDICATION.—Such dedication is irrevocable when third parties have been induced to act upon it, and part with value in consideration of it; although the property is not at once subjected to the uses designated, and the dedication has not been formally accepted by the public authorities.
3. SALE BY MAP DEDICATION.—A sale of property, in a place laid out as a town, by reference to a map on which streets and public grounds are designated, is a sale, not merely for the price named in the deed, but for the further consideration that the streets and public grounds shall remain forever open to the purchaser, and to any subsequent purchasers in the town. The purchaser takes not merely the interest of the grantor in the land but, as appurtenant to it, an easement in the streets and public grounds named, with an implied covenant that subsequent purchasers shall be entitled to the same rights.
4. ADVERSE POSSESSION OF PUBLIC SQUARE.—No one can acquire by adverse occupation, as against the public, the right to a street or square dedicated to public uses.

Before MR. JUSTICE FIELD.

THIS case was tried without a jury, by stipulation of the parties. The facts are stated in the opinion of the court.

Andros & Page, for the plaintiff.

Mastick & Belcher, for the defendant.

MR. JUSTICE FIELD. This is an action for the possession of a parcel of land situated in the town of Hayward, Alameda county. The plaintiff traces title to the premises from one Guillermo Castro, to whom a grant of land, of which they are a part, was made by the former Mexican government. The grant was confirmed by the tribunals of the United States, under the act of March 3, 1851, and a patent was issued to the confirmer. The defendant, the town of Hayward, claims that the premises are a part of a tract dedicated by Castro to the public use of the town

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previously to the conveyance under which the plaintiff asserts title. The main question for determination relates to the validity and permanence of the alleged dedication.

The facts of the case, as disclosed by the evidence, are briefly these: In 1854, Castro, being desirous of founding a village or town on his land, selected for that purpose a portion of it, which included his residence, as a site for the town, and caused it to be surveyed into blocks and streets, and had a map made on which the streets were named and the blocks numbered. Upon this map the town was designated San Lorenzo. The map showed that the streets were to be eighty feet wide, and that the blocks were to be four hundred feet in length and three hundred feet in width. One of the blocks—the one bounded on the north by Webster street, on the east by Castro street, on the west by Watkins street, and on the south by Clay street—was marked "Plaza" on the map. The premises in controversy are a part of this block.

One of the streets, called Castro street, was coincident with the county road running between San Leandro, the county seat, and San Jose, the county seat of Santa Clara county. The map was filed by Castro for record on the second of December, 1854. Subsequently two sales of parts of blocks bounded by streets as laid down on this map were made by him. In 1856, for the purpose, as is said, of securing to himself a lawn or yard in front of his house, he caused the street bearing his name to be resurveyed, and he located it sixty-six feet farther west than it was located according to the map of 1854. The block occupied by him as his residence was thus widened sixty-six feet, and all other blocks and streets west of him were pushed sixty-six feet to the westward. A new map was then made of the town, showing the streets and blocks as thus changed, and on the eighth of April, 1856, was filed in the office of the recorder of the county. Soon afterwards Castro street was opened, and the county road made to conform to it, and since then, now a period of over twenty years, has been continuously used as a street of the town, and as part of the public highway from San Leandro to San Jose.

A copy of the map was exhibited in the office of Castro to parties seeking to purchase lots in the town, and lots were sold by him and his agent, and deeds executed with reference to it, or the lots were bounded by streets designated upon it. The block marked "Plaza" was spoken of by them as reserved for public use, and sales of portions of it were refused for that reason.

The plaintiff derives whatever title he has from the purchaser at a sale made in 1864 upon a foreclosure of mortgages upon the tract of land embracing the town of San Lorenzo, executed by Castro in 1858, 1859, and 1862.

The name of the town was subsequently changed from San Lorenzo to Hayward, and under this latter name was incorporated by the legislature in March, 1876. The act of incorporation authorized the board of trustees created by it "to provide for inclosing, improving, and regulating all public grounds at the expense of the town," and of course to take control of them for that purpose.

Some time prior to January 5, 1877, Luis Castro, son of Guillermo, as county surveyor, by direction of the board of trustees, made a survey of the town in accordance with the map of 1856, and the survey was finally approved and the map officially adopted by an ordinance passed January 6, 1877. The plaintiff, Grogan, at the time claiming under conveyances from Castro and the holder of the mortgages mentioned (subsequently the purchaser on their foreclosure), constructed warehouses on a part of the block marked on the map as the plaza, and occupied them from 1864 to 1877. In the latter year these warehouses were burned down, and soon afterwards the authorities of the town took possession of the ground as part of its public plaza. Hence the present suit.

Upon this statement of the case there ought to be no doubt as to the judgment of the court. In the light of adjudications almost without number in the courts of the several states, and in those of the United States, the law as to what constitutes a dedication of private property to public purposes, so as to be beyond the recall of the original owner, would seem to be settled.

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A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact. If nothing beyond the declaration be done—if there be no acceptance by the public of the dedication, and no interest in the property be acquired by third parties—the dedication may be recalled at the pleasure of the owner. But if the dedication be accepted by the public authorities of the place where the property is situated, or contracts for a valuable consideration be made by others founded upon a supposed appropriation of the property to the uses indicated, the dedication becomes irrevocable. In the one case the acceptance completes the transfer of the property, or easement in it, from the owner to the public; in the other case the contract with the owner estops him from asserting any interest except in common with the purchasers from him.

In the present case the intent of Castro to dedicate the streets and the block marked "Plaza" in the town of San Lorenzo was manifested in the most open and public manner. The filing in the office of the county recorder of the map containing a designation of the streets and blocks, as set apart for public uses, was a public declaration of the fact. Whether, if nothing further had been done by him, there would have been any such interest acquired by the public as to forbid a subsequent assertion of ownership may be questioned. But when by the sale of property by reference to the map filed, or bounded by streets marked upon it, other parties had become interested in the property set apart for public uses, the owner was precluded from asserting his original rights. The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser, and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in his deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an implied covenant that sub-

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sequent purchasers should be entitled to the same rights. The grantor could no more recall this easement and covenant than he could recall any other part of the consideration. They added materially to the value of every lot purchased.

No formal acceptance by the public authorities of the dedication, upon which the counsel for the plaintiff so much insist, was essential. No such acceptance could have been had until the town was organized by the legislature. Until then there were no officers of the public to express an acceptance, and Castro held the legal title of the property dedicated in trust for the public, being precluded by his sales from the assertion of ownership freed from the public easement. A formal acceptance by the public authorities of a dedication may be necessary to impose upon them the duty of protecting the property and keeping it in a condition to meet the uses designed—as for instance to open and repair a street—but it is in no respect essential to complete the dedication and preclude the original owner from revoking it. The dedication is irrevocable when third parties have been induced to act upon it and part with value in consideration of it. Nor is this irrevocable character of the dedication affected because the property is not at once subjected to the uses designed. In many instances, perhaps the greater number, there may be no present need of the land for the purposes contemplated, as in the case of streets and parks laid out upon a tract added to an existing city to meet its supposed future growth, or, as in the present case, upon a tract selected as a site for a new town. In such cases it is understood that the property will only be subjected to the uses intended as it may be from time to time needed to meet the growth of the place. If an immediate subjection were required in such cases, the object of the dedication would be defeated.

As already indicated, adjudications in cases similar to the one now before the court are numerous, and in all of them, without exception, the views here expressed are sustained. One of them—*Rowan's Executors v. The Town of Portland*, 8 B. Mon. 232—may be mentioned as especially learned and instructive upon the subject.

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The change in the position of some of the streets sixty-six feet further west of their original position, as shown on the map of 1854, when only two sales had been made, does not appear to have met with any objection from the previous purchasers; and the subsequent sales according to the map of 1856, and the approval by the trustees of the town of the survey of 1877, made in accordance with it, would seem to obviate all objections to the change, even if the plaintiff were in a position, as he is not, to contest its validity.

The mortgages, upon the foreclosure of which the land was sold and the grantor of the plaintiff acquired his title, were executed after this dedication had become irrevocable, and the purchaser at the mortgage sale took whatever rights he acquired in subordination to the interest of the public represented since the incorporation of the town by its authorities.

As to the defense that the statute of limitations of the state has barred the action, it is sufficient to refer to the decisions of the supreme court of California in *Hoadley v. The City of San Francisco*, 50 Cal. 265, and *People v. Pope*, 53 Id. 437. According to them, no one can acquire by adverse occupation as against the public, the right to a street or square dedicated to public uses. The construction given by the supreme court of the state to the local statute is conclusive upon this court.

It follows that the finding of the court upon the issues presented must be for the defendant, and judgment will accordingly be entered in its favor.

NORTH NOONDAY MINING CO. v. ORIENT MINING CO. No. 2.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 6, 1880.

1. MINING CLAIM.—PROOF OF CITIZENSHIP.—On the trial of the right to a mining claim under chapter 6 of the R. S. of the United States, the affidavit of the party is made admissible in evidence by the provisions of section 2321, to prove the citizenship of a locator of the claim.
2. TITLE BY ACTUAL POSSESSION.—Where a party claiming title under a con-

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veyance by specific bounds is in actual possession and occupation of a mining claim of no greater extent than the laws allow him to hold, and is actually engaged in working the same, which claim is also distinctly marked out by lines of stakes on both ends and at the corners, so that the boundaries are easily seen and traced, a party entering upon such actual possession without prior right is a trespasser, and can gain no rights as against the possessor, although the latter may not have taken up and held the claim in all particulars in the mode required by law to enable him to maintain a constructive possession.

3. NEW TRIAL—ERROR.—Even where error has intervened in the course of the trial, a new trial should not be granted, if upon the whole record, the court can clearly see that no injury resulted, and that the verdict is right on other grounds notwithstanding the error.

Before SAWYER, Circuit Judge.

MOTION for new trial in the case reported at page 299, *ante*. The facts are sufficiently indicated in the charge set out in the former report (which see) and in the opinion of the court.

Stewart, Van Olief & Herrin, for plaintiff.

R. M. Clark and George B. Merrill, for defendant.

SAWYER, Circuit Judge. All the points made by defendant on motion for new trial were fully argued and considered at the trial, and I see no good reason for changing the rulings then made. The point most confidently relied on by defendant seems to be the admission of the affidavit of Smith to prove his citizenship. I am not entirely certain that any other evidence was necessary to raise the presumption of citizenship, than the fact that he had resided in the United States from his infancy—during all the period of his remembrance—he having no personal knowledge of having been alien born, and no recollection of ever living elsewhere; and there being no evidence from any one having knowledge that he was foreign born. If this be so, then there is no evidence to overthrow the presumption, other than his statement that he was informed that he was born in Ireland, and brought to this country by his parents when two years old; and this is but hearsay, and his counter statement, that he was informed in the same man-

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ner and had always understood that his father became naturalized while he was a boy, is at least as good. If the hearsay evidence was inadmissible and proves nothing upon the one point, it was equally so on the other. It must all be taken or all be rejected together. But, if it was necessary to make this additional proof, the affidavit was, undoubtedly, inadmissible upon the general principles of evidence unaffected by statutory provisions.

The statute, however, has made especial provision for such cases in section 2341, which says: "Proof of citizenship under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief." This provision must of necessity contemplate an affidavit to some extent based on information and belief, for no man can, of his own personal knowledge, state where he was born. It is an event occurring before he has acquired a capacity to remember. It also substitutes an affidavit for the record in this case of one's having been naturalized. It, also, contemplates an affidavit on information and belief, where the naturalization of persons other than the party making the affidavit are concerned; for the affidavit of the "authorized agent" of associations not incorporated may be "upon information and belief." It might be utterly impracticable for a person whose father had been naturalized and moved to some distant territory, and died during his infancy, as is supposed to be the case in this instance, to ascertain in which one of the hundreds of courts in the United States having jurisdiction, the father was naturalized. At all events, in view of the practical difficulties in making the proofs, or for some other reason, the statute has modified the rule of evidence in this instance, and made such affidavits not only competent, but sufficient proof of citizenship; for it requires no other. It is insisted, however, that this is admissible only in the land office for the purpose of entitling the locator to a patent, but does not extend to suits between private parties respecting the right to the claim. But the

statute says "*under this chapter*," and the chapter provides for sending the parties to the courts to try their rights when there are conflicting claims; and in my judgment the provisions apply to all the purposes of the act—to the litigation of all claims arising under the act, whether in the department, or in the ordinary courts of the country. Evidence which is competent and sufficient to establish a right to a patent to a mining claim as against the government—the actual owner of the land and mine—ought to be competent and sufficient to maintain the party complying with the statute in his possession and claim against a stranger trespassing upon his possession and claim, which would be otherwise recognized as valid by the statute as against the government. I do not think Congress designed to establish one rule of evidence or right for the government, and another for citizens, as to the same claim arising under the statute and especially in favor of trespassers upon the possessions of others. I, therefore, hold the affidavit of Smith to be competent evidence, and properly admitted under the statute.

But conceding, for the purposes of this decision, the admission of the affidavit, as to citizenship, to be erroneous, still, in view of the other uncontradicted testimony in the case, the error became immaterial. It appeared by clear, uncontradicted, positive testimony, that the plaintiff's grantors, some, at least, of whom were citizens before defendants entered, or began to run their tunnel, distinctly marked the three claims, limiting the Noonday North to one hundred feet wide, by stakes driven at each corner and the center of the end lines, the stakes being three and a half feet high, by four inches square, painted white and lettered, to show what they were, and what claims they indicated, each claim so staked out being one hundred feet wide, and one thousand five hundred long, lying side by side, and within the limits of the lines of the original Noonday North as located three hundred feet wide on each side of the center. These stakes bounded a parallelogram three hundred feet wide, by one thousand five hundred long, marked by a line of five stakes as described on each end. These claims were conveyed to

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the plaintiff by one and the same deed giving definite descriptions, and plaintiff went into actual possession and occupation of them, claiming title under the deeds up to the extreme boundary as staked off long before defendant entered, and they so continued on the claims, erecting machinery and sinking shafts for working the claims down to and at the time of defendant's entry and the trespass complained of, having at the time of such entry and trespass expended in labor and the collection of materials on the premises the amount of some twenty-five or thirty thousand dollars. So that before defendant acquired any rights, and down to and at the time of defendant's entry, the plaintiff was in the actual, active, dominating possession, occupation, and control of the premises thus marked out and thus conveyed, claiming the whole under the conveyance. Plaintiff's said stakes were still there as described when defendant entered and committed the trespass complained of, and defendant made its claim within the claims so at the time staked out. As to the extent of the possession of parties actually in possession claiming under deeds and up to marked boundaries, see *Hicks v. Coleman*, 25 Cal. 122, and the numerous cases from the United States supreme court reports therein cited. (*Walsh v. Hill*, 38 Id. 487.)

The plaintiff, before defendant acquired any rights, and at the time of its entry and of the trespass complained of, was in as complete actual possession and occupation up to the boundary indicated by their stakes, as it could well have been, except by inclosing it with a fence sufficient to exclude trespassers. The plaintiff was there physically present by its agents, in active labor and control. This being so independent of such constructive possession as the mining laws give by simple compliance with its provisions, there was a continual actual possession and occupation upon which defendant could not enter without being a trespasser. The supreme court of California held that a mining claim in actual possession of the claimants is valid, irrespective of mining laws. (*English v. Johnson*, 17 Cal. 107; *Table Mountain Tunnel Co. v. Stranahan*, 20 Id. 209; S. C., 31 Id. 390; *Hess v. Winder*, 30 Id. 355; *Rogers v. Cooney*, 7

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Nev. 219.) These cases have been cited and approved by the supreme court of the United States in the recent case of *Campbell v. Rankin*, 99 U. S. 262. And as I understand the recent decisions of the supreme court of the United States under the pre-emption laws, no man can initiate a pre-emption or other right under those laws by an entry upon the actual possession of another, be that other a competent pre-emptor, or rightfully in possession, as against the government or otherwise. (*Trenouth v. San Francisco*, 100 Id. 251, 256; *Atherton v. Fowler*, 96 Id. 513.) If that be so, the principle is equally applicable to rights acquired in mining claims. It would be strange indeed if congress should pass laws to encourage trespasses and breaches of the peace, by authorizing a title to be initiated and founded upon a trespass, upon the actual possession of another.

Upon the whole record, I am entirely satisfied that a new trial should not be granted, even if there was error in admitting the affidavit of Smith, and the several other affidavits to which exception was taken in the course of the trial, on the question of citizenship. On this view, also, errors in other rulings, if any there be, become immaterial.

Ordered, that a new trial be denied.

THE GIANT POWDER CO. v. CALIFORNIA VIGORIT POWDER CO. ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 12, 1880.

1. REISSUED PATENTS.—A reissue of a patent can only be had, under the R. S., when the original patent is inoperative, or invalid from one of two causes, either by reason of a defective or insufficient specification, or by reason of the patentee claiming, as his own invention or discovery, more than he had a right to claim as new—and even then only where the error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention.
2. JURISDICTION OF COMMISSIONER TO REISSUE PATENTS.—The power to accept a surrender, and to issue new letters of patent, is vested exclusively in the commissioner of patents, and his decision in such cases is not open

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to collateral attack in a suit for the infringement of the reissued letters. But the commissioner being an officer of limited authority, this does not preclude the examination by the court of the original and reissued patents, to see whether or not they disclose on their face a case in which he had jurisdiction to act.

3. REISSUED PATENT, WHEN VOID.—If, upon a comparison of the original and reissued patents, it appears that the commissioner has acted in a case in which he had no jurisdiction, or that he has exceeded his jurisdiction, the reissued letters are void.
4. ENLARGING CLAIM IN REISSUE.—Whenever it appears, on a comparison of the two letters patent, that the original patent is valid and operative to the extent of its specifications and claim, the commissioner has no authority to grant a reissue enlarging the claim beyond the original specifications. If the patentee has invented or discovered something beyond the original specifications and claim, his course is to seek a separate patent for it.
5. PRESUMPTION OF ABANDONMENT.—If a patentee does not embrace by his specifications and claim all that he might have done, and there has been no clear mistake, inadvertence, or accident in their preparation, the presumption of law is that he has abandoned to the use of the public everything outside of them, or has postponed any additional claim for further consideration.
6. INEXPLOSIVE, IN WHAT SENSE USED.—The court can examine into the history of a patent, so as to be able to read the specifications annexed to it in the light of the inventor's knowledge: *Held*, therefore, in view of the history of the labors of the patentee in this case, and the specifications of the patent, that the inventor must be considered to have used the term "inexplosive" in its natural and ordinary sense, and that the attempt to limit its meaning was an after-thought of his assignees, so as to bring within it compounds not contemplated by him.
7. REISSUE FOR DIFFERENT INVENTION VOID.—Where the original patent described a compound consisting of two ingredients, namely, an *inexplosive porous* substance, and nitro-glycerine, a reissue covering a compound of *all porous substances, whether explosive or inexplosive*, with nitro-glycerine, which would be equally safe for handling and use, was held to be void as being for a different invention.
8. PETITION FOR REHEARING—PRACTICE.—A petition for a rehearing in a court of original jurisdiction, after entry of a final decree in an equity suit, is not an *ex parte* proceeding, and can only be presented on notice, and considered after the other side has had an opportunity to answer it.

Before MR. JUSTICE FIELD.

THIS was a case for an alleged infringement of reissued letters of a patent for an explosive compound known as "dynamite, or giant powder," and to recover the profits and income obtained by the defendants from a violation of the

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patentee's alleged rights, and to restrain further infringements. The patent was for an alleged invention of one Alfred Nobel, an engineer of Sweden. His invention was assigned to one Bandmann, in April, 1868, and in May of that year a patent was issued to him for the term of seventeen years. The following is a copy of the specifications and claim annexed to it:

SPECIFICATIONS.

LETTERS PATENT OF THE UNITED STATES, No. 78,317, May 26, 1868. Granted Alfred Nobel, of Hamburg, Germany, Assignor to Julius Bandmann, of San Francisco, Cal.

IMPROVEMENT IN EXPLOSIVE COMPOUNDS.

To all whom it may concern:

Be it known that I, Alfred Nobel, of the city of Hamburg, Germany, have invented a new and useful composition of matter, to wit, an explosive powder, of which the following is a specification:

The nature of the invention consists in forming out of two ingredients long known, viz., the explosive substance nitro-glycerine, and an inexplusive porous substance hereinafter specified, a composition which, without losing the great explosive power of nitro-glycerine, is very much altered as to its explosive and other properties, being far more safe and convenient for transportation, storage, and use than nitro-glycerine.

In general terms, my invention consists in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and which, at the same time, is free from any quality which will decompose, destroy, or injure the nitro-glycerine, or its explosiveness.

It is undoubtedly true, as a general rule, that nitro-glycerine, when mixed with another substance, possesses less concentration of power than when used alone; but while the safety of the miner (to prevent leakage into seams in the rock) prohibits the use of nitro-glycerine without cartridges, which latter must, of course, be somewhat less in diameter than the bore-holes which are to contain them, the powder herein described can be made to form a semi-pasty mass, which yields to the slightest pressure, and thus can be made

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to fill up the bore-hole entirely. Practically, therefore, the miner will have as much nitro-glycerine in the same height of bore-hole with this powder as with nitro-glycerine in its pure state.

This is the real character and purpose of my invention; and in order to enable others skilled in the art to which it appertains, or with which it is most nearly connected, to make, compound, and use the same, I will proceed to describe the same, and also the manner and process of making, compounding, and using it, in full, clear, and exact terms.

The substance which most fully meets the requirements above mentioned, so far as I know or have been able to ascertain from numerous experiments, is a certain kind of silicious earth, or silicic acid, found in various parts of the globe, and known under the several names of silicious marl, tripoli, rotten-stone, etc. The particular variety of this material which is best for my compound is homogeneous, has a low specific gravity, great absorbent capacity, and is generally composed of the remains of infusoria.

So great is the absorbent capacity of this earth, that it will take up about three times its own weight of nitro-glycerine, and still retain its powder form, thus leaving the nitro-glycerine so compact and concentrated as to have very nearly its original explosive power; whereas, if another substance having a less absorbent capacity is used, a correspondingly less proportion of nitro-glycerine will be absorbed, and the powder be correspondingly weak or wholly inexplusive. For example, most chalk will take but about fifteen per cent. of nitro-glycerine, and retain its powder form; twenty per cent. will reduce it to a paste. Porous charcoal has also a considerable absorbent capacity, but it has the defect of being itself a combustible material, and also of less elasticity of its particles, which renders it easy to squeeze out a part of its nitro-glycerine.

The two materials are combined in the following manner: The earth, thoroughly dried and pulverized, is placed in a wooden vessel. To it is introduced the nitro-glycerine in a steady stream, so small that the two ingredients can be kept thoroughly mixed. The mixing may be effected by the naked

hand, or by any proper wooden instrument used in the hand, or by wooden machinery. Sufficient nitro-glycerine should be used to render the compound explosive, but not so much as to change its form of powder to a liquid or pasty consistency. Practically, about sixty parts, by weight, of nitro-glycerine to forty of earth forms the useful minimum, and seventy-eight parts, by weight, of nitro-glycerine to twenty-two of earth the useful maximum of explosive powder. The former has a perfectly dry appearance; the latter is pasty. Between these two extremes the composition will be explosive powder, and it will be more easily exploded, and its explosive power greater, as the relative proportion of the nitro-glycerine is greater.

The proportions, by weight, of seventy-five of nitro-glycerine to twenty-five of earth, gives a powder as well adapted to ordinary practical purposes as that from any proportions I am now able to name, and can be easily compressed to a specific gravity nearly equal to that of pure nitro-glycerine. When the mass has been intimately mixed and thoroughly incorporated by stirring and kneading, it is rubbed through a hair, silk, or brass-wire sieve (iron corrodes), and any lumps which may remain are rubbed with a stiff bristle brush till they are reduced and made to pass the sieve. The powder is then finished and ready for use. The fineness desired for the powder will determine the fineness of the sieve to be used.

The chief characteristic of this powder is its nearly perfect exemption from liability to accidental or involuntary explosion. It is far less sensitive than nitro-glycerine to concussion or percussion, and, contained in its usual packing, a wooden cask or box, the latter may be smashed completely to pieces without any danger of an explosion. Unlike gunpowder, in the open air or in ordinary packing, a wooden cask or box, it burns up when set fire to, without exploding. It can, therefore, be handled, stored, and transported with less danger than ordinary gunpowder. When confined in a tight and strong inclosure it explodes by heat applied in any form, when above the temperature of three hundred and sixty degrees Fahrenheit. Under all other

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circumstances it may be exploded by some other explosion in it or into it.

The most simple and certain method known to me of exploding it, is as follows: The end of a common blasting-fuse is inserted into a percussion cap, and the rim of the cap crimped tightly and firmly about the fuse by nippers or other means, so as to leave the fulminating powder of the cap and the end of the fuse tightly and firmly inclosed together. The end of the fuse with the cap attached is then imbedded in the powder, the more firmly the more certain the explosion.

In blasting, the powder is pressed tightly about the cap and fuse, and tamping of sand, or other proper material, added and pressed, but not pounded in. A tamping firmly pressed is as good as if rammed in the most solid manner. The fuse explodes the cap, and this explosion explodes the powder.

I will add here, that by carefully packing the end of a good fuse amid the powder of a charge inclosed like a blasting-charge in a tight place, the fuse alone will explode the powder, especially if the powder is strongly charged with nitro-glycerine; but this method of explosion requires too much care, and is too uncertain to be depended upon or generally used.

As before stated, the more strongly the powder is charged with nitro-glycerine the more easily it explodes. If, therefore, the powder contains a low proportion of nitro-glycerine, it is necessary to employ in its explosion a correspondingly long, strong, and heavily charged percussion cap, made especially for the purpose. For the sake of certainty of explosion, it is better to use such a cap in all cases. If the fire from the fuse comes in contact with the powder before the cap is exploded (which is liable to occur if the fuse is leaky and the cap extends too far into the powder) a portion of the powder will be burned before the explosion takes place. To guard against this, the cap should only be fairly inserted into the powder, and poor fuses wound next to the cap firmly with strong glued paper or hemp, or otherwise secured. The bore-holes, as a practical but not absolute

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rule, should be about one half the size, and the charge should be from one fifth to one tenth the quantity ordinarily used in gunpowder blasting. A very convenient form in which to use the powder, is to pack it firmly in cartridges of strong paper.

Having thus described my invention, what I claim as new, and desire to secure by letters patent, is the composition of matter made substantially of the ingredients and in the manner and for the purposes set forth.

ALFRED NOBEL.

Witnesses: J. P. Ohme, Heinr. Barteltzen.

Bandmann assigned his interest to the complainant, a corporation created under the laws of California, and in October, 1873, this company surrendered the patent and obtained reissued letters for the residue of the term. In March, 1874, this reissue was also surrendered, and new letters patent were issued, for the alleged infringement of which this suit was brought.

The following is a copy of the specifications and claim annexed to this reissued patent:

REISSUE PATENT, No. 5799, March 17, 1874. Alfred Nobel, of Hamburg, Germany, Assignor, by Mesne Assignments, to the Giant Powder Company of San Francisco, California.

IMPROVEMENT IN EXPLOSIVE COMPOUNDS.

To all whom it may concern:

Be it known that Alfred Nobel, of the city of Hamburg, in the empire of Germany, did invent an improved explosive compound, of which the following is a specification:

This invention relates to a new and useful combination or mixture of nitro-glycerine with some absorbent substance, whereby the condition of the nitro-glycerine is so modified as to render the resulting explosive compound more practically useful and effective as an explosive, and far more safe and convenient for handling, storage, and transportation, than nitro-glycerine in its ordinary condition as a liquid. The invention consists in combining or mixing with nitro-glycerine some porous or absorbent substance, which, being free from any quality which will cause it to decompose, de-

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stroy, or injure the nitro-glycerine, forms, in combination with it, an explosive compound possessing certain marked properties of great practical utility, which not only increase its efficiency, but also obviate many of the serious practical objections to the employment of nitro-glycerine as an explosive. Some of these peculiar properties of this mixture will be briefly stated.

Nitro-glycerine being a liquid, it is usually necessary, in exploding it as an explosive for blasting purposes, to place it in cases or cartridges formed of paper, metal, or other substance, which must, of course, be of somewhat smaller diameter than the bore-holes, as, if not so inclosed, the nitro-glycerine would permeate the seams of the rock, and prove highly dangerous to the miner on account of its liability to explode in subsequent drillings; but by means of this invention, the nitro-glycerine being held in combination with the porous or absorbent substance with which it is mixed, and then assuming the altered form of a powder or paste, remains in the bore-hole in which it is placed, without leaking through the seams of the rock.

Another advantage over liquid nitro-glycerine is that this mixture can be made to fill the bore-hole more closely than a cartridge-case will, owing to the irregularities of shape of the hole, which greatly increases its efficiency. The liability of fluid nitro-glycerine to accidental explosion from agitation or concussion renders its handling and transportation very dangerous. This danger is, however, almost entirely obviated by the use of the compound described in this specification, because, when mixed with a suitable absorbent, the nitro-glycerine is far less sensitive to shocks than when in a liquid condition, so that it may be handled in mass, either loose or in packages, with impunity. So much is this the case, that when this mixture is packed in a wooden case or box, the inclosure may be knocked to pieces without danger of exploding its contents.

This invention, then, consists in mixing liquid nitro-glycerine with some solid (as distinguished from liquid or fluid) substance which will absorb and retain a sufficient amount of nitro-glycerine to form an efficient explosive.

The substance which is believed to be the best adapted for this purpose is a kind of silicious earth, found in various parts of the globe, and known by the various names of silicious marl, tripoli, and rotten-stone. The peculiar variety of this material best suited for this use is homogeneous, has a low specific gravity, and great absorbent capacity, and is generally composed of the remains of infusoria. So great is the absorbent capacity of this infusorial earth, that when in a pulverized condition it will take up about three times its own weight of liquid nitro-glycerine and still retain the form of a powder. Other porous substances, even though they have less absorbent capacity, may be used; but in this case the explosive strength of the powder will be diminished, owing to the smaller proportion of nitro-glycerine contained therein. Chalk, for example, will absorb about fifteen per cent. of nitro-glycerine and retain its powdered condition, and porous charcoal, although of greater absorbent capacity, has less elasticity of particles, so that nitro-glycerine is apt to squeeze out of it. Any of the various vegetable or mineral substances susceptible of pulverization or comminution, and which will retain nitro-glycerine by absorption, may be substituted for infusorial earth.

The relative proportion of the ingredients used in making this new explosive compound will vary according to the absorbent capacity of the substance mixed with the nitro-glycerine, it being preferable in all cases—and this is the only limit—to use so much only of the liquid nitro-glycerine as the absorbent substance will retain without liability to subsequent separation by compression or leakage. Where the absorbent used in a powdered condition is infusorial earth, a thin paste or semi-fluid condition of the mixture is to be avoided.

The method of making this new explosive compound with infusorial earth is as follows: The earth being first thoroughly dried and pulverized, is placed in any suitable vessel, and the nitro-glycerine is then gradually introduced and thoroughly mixed with the powdered earth, which is effected either by stirring with the naked hand or by means of any suitable wooden instrument, worked either by machinery or

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by hand. Where infusorial earth is used, the proportions may be conveniently varied, from sixty parts, by weight, of liquid nitro-glycerine, and forty parts, by weight, of infusorial earth, to seventy-eight parts, by weight, of nitro-glycerine, and twenty-two parts, by weight, of infusorial earth, the former proportions forming, at ordinary temperatures, a dry, pulverulent mass, and the latter a pasty mixture. These proportions may, however, be varied outside of the limits above stated, it being observed that the explosive force of the mixture is increased where a larger proportion of nitro-glycerine is employed, and that when the mixture is to be used in a cold climate a larger quantity of nitro-glycerine may be safely employed than when it is to be exposed to a warmer atmosphere. For ordinary practical purposes, a mixture of seventy-five parts, by weight, of nitro-glycerine, and twenty-five parts, by weight, of infusorial earth, gives a powder sufficiently dry at ordinary temperatures, and which is susceptible of compression to specific gravity nearly equal to that of pure nitro-glycerine. When the ingredients have been intimately mixed and thoroughly incorporated by stirring and kneading, the compound may be rubbed through a sieve made of hair, silk, or brass wire, and any lumps which remain may be powdered by rubbing them through the sieve with a stiff-bristle brush. The powder is then ready for use, and may be packed in bulk, in boxes, or compressed into cartridge-cases made of paper, of such convenient sizes as may be most in demand for blasting purposes. A greater or less degree of fineness of grain may be given to the powder by using a fine or coarse sieve.

In using this improved explosive compound for blasting, it may be inserted into cartridge-cases, as above stated, or without any inclosure or wrapping, as may be preferred. For the best effect it should be pressed firmly down so as to fill the bore-hole, whether in cartridge or not, a small quantity at a time, with a wooden rod, until it is firmly packed. If the cartridges are smaller than the bore, the pressure will burst them, and allow the powder to spread laterally and fill the bore. It may be easily and efficiently exploded by

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means of an ordinary blasting-fuse inserted into the open end of a percussion-cap, the metallic edges of the cap being compressed or crimped tightly and firmly around the fuse, so as to hold it in place, with the end of the fuse in close contact with the fulminate in the percussion-cap. The capped end of the fuse is then inserted into the explosive powder which is pressed closely around it in the bore-hole, and a tamping of sand or other suitable material may be placed above the charge of powder and pressed down upon it. The fuse thus applied is fired in the ordinary manner, and when the fire reaches the percussion-cap it explodes, which effects the immediate explosion of the explosive compound. It is better to use a percussion-cap having a heavy charge of fulminate, in order to insure an explosion of the powder, although under favorable circumstances it might be exploded with an ordinary fuse without any cap; but this method is too uncertain to be relied upon.

For ordinary blasting, the bore-holes may be about one half the size, and the charge of explosive compound about one fifth the quantity that would be made use of when gun-powder is used as the explosive.

What we claim as the invention of Alfred Nobel, and desire to secure by letters patent in the name of the Giant Powder Company, as assignee (through mesne assignments) of the said Alfred Nobel, is the combination of nitro-glycerine with infusorial earth, or other equivalent absorbent substance, as a new explosive compound.

In witness whereof, the said Giant Powder Company affixes its seal, and the president of the same his official signature, this twenty-ninth day of January, 1874.

THE GIANT POWDER Co. [L. s.]

By GEO. C. HICKOX, President.

Witnesses—H. Pichoir, Jordan W. Roper.

All other material facts in the case sufficiently appear in the opinion of the court.

Causten Browne, and McAllister & Bergin, for the complainant.

S. M. Wilson, and Wright & Hammond, for the defendants.

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Mr. Justice FIELD. The complainant is the holder of a patent bearing date March 17, 1874, for an alleged new explosive compound known as "dynamite or giant powder." For some time since its issue, the defendants have been engaged in making, selling, and using an explosive compound averred to be substantially the same as the compound described in the patent. This suit is brought for the alleged infringement, with a prayer that the defendants be required to account and pay over to the complainant the income and profits obtained by them from this violation of its rights, and be restrained from further infringement.

The compound patented is claimed to be the invention of Alfred Nobel, a distinguished engineer of Sweden. His invention, whatever may have been its extent, was assigned to one Bandmann, in April, 1868, and in May following a patent for the same was issued to him for the term of seventeen years. Soon afterwards Bandmann assigned his interest to the complainant, the Giant Powder Company, a corporation created under the laws of California, and in October, 1873, this company surrendered the patent, and obtained reissued letters for the residue of the term. In March, 1874, this reissue was also surrendered, and new letters patent were issued, for the infringement of which the present suit is brought.

The bill alleges that the surrender of the original letters, the first reissue, its surrender, and the second reissue, were each made for "good and lawful cause;" but it does not specify what that cause was. The allegation will, however, be taken to be that the cause was one for which the statute authorized a surrender and a reissue. The bill also alleges that each reissue was for the same invention described in the original patent.

The answer denies both of these allegations and avers that the original letters and the first reissue were not surrendered because they were invalid by reason of a defective and insufficient specification, arising from inadvertence, accident, or mistake, without any fraudulent intention on the part of the patentees, and charges that they were surrendered upon false representations, with the intent to inter-

polate and obtain in reissued letters claims and grants for more than was embraced by the invention of Nobel described in the original patent, and that the reissued letters were not for the same invention, but for another and different one. And the defendants insist that for this and other reasons the reissued letters are invalid.

On the argument, the counsel of the complainant stated that the second reissue was obtained to correct a clerical error in the description of the grantee, and that it does not differ in its specifications from the first reissue; so that practically there is but one reissue in the case. So treating the matter, the question presented to us, at the outset, relates to the validity of this reissue.

7 The act of congress of 1870, embodied in the R. S., under which the reissue was granted, provides that "whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or, in the case of his death, or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended patent."

As thus seen, a reissue can only be had when the original patent is inoperative or invalid from one of two causes—either by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new. And even then the patentee can only obtain a reissue where the error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention.

As the power to accept a surrender and issue new letters

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is vested exclusively in the commissioner of patents, his decision in the matter is not open to collateral attack in a suit for the infringement of reissued letters. His action, like that of all officers specially designated to perform a particular duty of a judicial character for the government, is presumed to be correct, until impeached by regular proceedings to annul or modify it. He must judge in the first instance of the sufficiency of the original specification; whether the same is defective in any particular; whether such defect was the result of an unintentional error; and if so, to what extent a new or additional specification should be allowed to describe correctly the invention claimed; and it is to be assumed in every case that he has done his duty. The decisions of the supreme court to this effect are numerous, and the doctrine is among the settled rules of patent law. But it does not preclude the examination of the original and reissued patents, to see whether or not they disclose, on their face, a case in which the commissioner had authority to act, or whether he has exceeded his authority in issuing letters for an invention different from that described in the original patent. If they disclose a case in which the commissioner had no jurisdiction to act, or a case in which by his determination he has exceeded his jurisdiction, the reissued letters must fall. His determination can have no greater conclusiveness than that of the judgment of a regular judicial tribunal, and we all know that although such judgment cannot be collaterally attacked—by showing that the evidence upon which the court acted was insufficient; that improper testimony was admitted; that the court erred in its rulings upon matters of law; or that the verdict of the jury was against the weight of evidence—yet the record of the judgment can in all cases be examined to see whether the court had jurisdiction of the subject-matter and of the person of the defendant; and if such jurisdiction be wanting, the judgment is ineffectual for any purpose. So here upon all matters outside of the patents which the commissioner was to hear, and upon the weight of which he was to determine, his judgment is conclusive in the present suit; but if the patents disclose a

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case in which he had no jurisdiction, or in which he exceeded it, his determination carries with it no efficacy.

This is general and universal law, although we find expressions in opinions that the only question left open for the consideration of the court, in a suit for infringement of re-issued letters, is whether the new and the old patent are for the same invention. The expressions would be more accurate if they were, that seldom could any other question be raised; for seldom will it appear without the consideration of extrinsic evidence, whether or not the original patent was invalid or inoperative from a defect of specifications. Suppose, for illustration, that the specifications in two patents, the original and the reissued, were identical in their language, or differing in phraseology were identical in meaning—would it be pretended that, though their identity would be thus manifest on their face from a comparison of the two, and that the commissioner in granting the reissue had accordingly acted in a case not warranted by the statute, it must be assumed that the reissue was properly granted, and that the action of the commissioner could not therefore be questioned? The decisions support no such conclusions.

The commissioner is an officer of limited authority, and whenever it is apparent upon inspection of the patents that he has acted without authority or has exceeded it, his judgment must necessarily be regarded as invalid. His action must be restricted to the particular cases mentioned in the statute. That only authorizes a reissue, when from an unintentional error in the description of the invention the patent is invalid or inoperative, or when the claim of the patentee exceeds his invention. It is not sufficient that the patent does not cover all that the patentee could have claimed if his specifications had come up to his invention. If he has invented or discovered something beyond his original specifications and claim, his course is not to endeavor to cover it by a reissue, but to seek a separate patent for it.

The statute authorizing a reissue was intended to protect against accidents and mistakes, and it is only when thus restricted that it can be regarded as a beneficial statute. If a patentee does not embrace by his specifications and

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claim all that he might have done, and there has been no clear mistake, inadvertence, or accident in their preparation, the presumption of law is that he has abandoned to the use of the public everything outside of them, or at least has postponed any additional claim for further consideration.

In *Russell v. Dodge*, 3 Otto, 463, the supreme court, speaking of a reissue under the law of 1836, which is similar to the law of 1870, under which the present reissued letters were obtained, said: "A defective specification could be rendered more definite and certain, so as to embrace the claim made, or the claim could be so modified as to correspond with the specification; but except under special circumstances, such as occurred in the case of *Lockwood v. Morey*, 8 Wall. 230, where the inventor was induced to limit his claim by the mistake of the commissioner of patents, this was the extent to which the operation of the original patent could be changed by the reissue. The object of the law was to enable patentees to remedy accidental mistakes, and the law was perverted when any other end was secured by the reissue." See also *Railway v. Sayles*, 97 U. S. 563.

In the light of this decision and of the views expressed upon the act of congress, there can be but one answer to the question presented as to the validity of the reissue upon which this suit is founded. Looking at the original patent and the reissued patent, and the specifications annexed to them, we find that the material difference between them is as to the extent of the invention. The original patent covers a compound of nitro-glycerine and an inexplusive porous absorbent which will take up the nitro-glycerine and render it safe for transportation, storage, and use, without loss of its explosive power. The reissued patent enlarges the scope of the invention so as to embrace a compound of nitro-glycerine with any porous substance, explosive or inexplusive, which will be equally safe for use, transportation, or storage.

It is plain from a comparison of the specifications of the two patents, that their difference is in their application, the one covering only a compound of nitro-glycerine with inexplusive, porous, absorbent substances, the other covering

a compound of nitro-glycerine with all porous absorbents, whether explosive or inexplusive. We shall hereafter consider how far this changes the character of the invention. At present it is sufficient to say that it is manifest that if the reissued patent standing alone would be valid and operative, the original patent to the extent of its claim would be valid and operative also. In other words, that there is no foundation for the pretense that the original patent was invalid or inoperative from any defect of description. Its range or scope was more limited than the reissued patent, that is all. It was a valid and operative patent to the extent of its claim, and that covered the invention described. There was therefore no case presented upon which the powers of the commissioner could be invoked. There was no invalid or inoperative patent, from a defect of description, to be corrected by a reissue. The specifications annexed to the original patent were clear and sufficiently explicit for the compound composed of nitro-glycerine and the inexplusive porous substances mentioned, and the claim was only for a composition of matter made of the ingredients in the manner and for the purposes described in them. There was therefore nothing to correct in a reissue, according to the decision in *Russell v. Dodge*, 3 Otto, 463. The claim was as extensive as the invention specified, and there is no pretense that this was not sufficient to cover a compound of nitro-glycerine with inexplusive porous absorbents.

The case might be rested here, but respect for the able and distinguished judges of the first and second circuits, requires some notice of their decisions. They have held that the reissued patent is valid, against a defense that it covers a different invention from that described in the original patent, and that the term "inexplusive," in the original specifications, is used only in a relative sense, as compared with nitro-glycerine, and not in an absolute sense excluding the entire use of all explosive absorbents, whatever their degree of explosiveness. Their attention does not, however, appear to have been directed to the point, that if the original patent was valid and operative with the

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existing specifications, there was no case for a reissue for the consideration of the commissioner. On the contrary, their opinions, like the argument of counsel in the case, go to show, that the original patent was valid and operative, and that its specifications were sufficiently comprehensive to include explosive absorbents, if the resulting compound could be safely used, stored, and transported. If their positions be sound, there was no ground for a reissue, and the new letters cannot be sustained.

But, independently of this consideration, we are not able to concur with the learned judges as to their interpretation of the term "inexplosive" in the original patent, and consequent judgment that the reissued patent is for the same invention. While we cannot look outside of the patent for the explanation of terms in it which are not technical and are free from ambiguity, we can examine into the history of the invention patented, so as to be able to read the specifications in the light of the inventor's knowledge. We can place ourselves in his position, so as to see as it were with his eyes, and speak with his language. The natural signification of the term "inexplosive" would exclude explosive absorbents; and where an attempt is made to qualify and limit this meaning, we are at liberty to inquire into the circumstances under which the term was used. It was held by the supreme court of California, in construing an agreement concerning the boundary line of mining claims where the term "north" was used, that it was competent to show by the usage of the place that it had reference to the line indicated by the compass there, and not to a line due north according to the true meridian. (*Jenny Lind v. Bower*, 11 Cal. 194.)

Now, reading the history of the labors of Alfred Nobel to utilize the explosive power of nitro-glycerine, and render it safe to transport, handle, and use—the experiments he tried, first to explode the nitro-glycerine in mass; then in consequence of the dangers attending its use, to prevent its explosion when handled; the patents he obtained in Europe; his experience in the use of gunpowder and other explosives with nitro-glycerine—it is impossible to believe that he in-

tended anything different from the natural meaning of the term he used. He knew well the danger attending the use of nitro-glycerine with explosive absorbents, and in limiting his claim to its use with inexplusive absorbents, we must presume that he at that time intended to abandon all claim to compounds of a different character, or at least to leave such claim open for further consideration. If we read his own language, in an application made three years afterwards for a new patent, for a compound with explosive absorbents, presented to the commissioner of patents by the complainant, and therefore adopted and approved by it, there can be but little doubt on the subject. Soon after the new patent was obtained, the application for a reissue was made, evidently that it might reach back to the date of the original patent and cover inventions of other parties during the intermediate period—or that which had gone into public use.

We do not attach to the general language used by Nobel in the first patent, following the statement of the nature of his invention, the significance ascribed to it by counsel. We give it a different construction. The statement is that "the nature of the invention consists in forming out of two ingredients long known, viz., the explosive substance nitro-glycerine, and an inexplusive porous substance hereinafter specified, a composition which, without losing the great explosive power of nitro-glycerine, is very much altered as to its explosive and other properties, being far more safe and convenient for transportation, storage, and use than nitro-glycerine."

Following this statement is this language: "In general terms, my invention consists in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and which, at the same time, is free from any quality which will decompose, destroy, or injure the nitro-glycerine or its explosiveness." The substance here mentioned as possessing a great absorbent capacity has reference, not to any absorbent substance, but that which is specifically designated in the preceding statement of the ingredients of the compound—as if the inventor had said: "In general terms, my invention consists in mixing with

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nitro-glycerine a substance which possesses a very great absorbent capacity, which substance is porous and inexplusive, and is hereinafter specified." The inexplusive porous substances afterwards specified were certain kinds of silicious earth or silicic acid, known under the general term of silicious marl, tripoli, rotten-stone, and the like, the best of which was composed of the remains of infusoria.

This construction renders it unnecessary to give a forced meaning to the term inexplusive, and is consistent with all the preceding and subsequent statements and conduct of the inventor as disclosed in the history of his invention. It nowhere appears that he had any knowledge or belief when the first patent was issued, that the admixture of nitro-glycerine with explosive substances would produce a safety powder. That was a discovery which he did not make, or claim to have made. So when in his specifications he mentions charcoal as an absorbent, he observes that it has the "defect of being itself a combustible material."

To our mind, looking at the history of the invention, and reading the specifications of the patent in its light, it is clear that the inventor used the word "inexplusive" in its natural and ordinary sense, and that the attempt to limit that meaning is an after-thought of his assignees, desiring to bring within the reach of the patent compounds in no respect within his contemplation. In other words, the re-issued letters cover a compound not claimed by Nobel and not embraced in the original patent.

It follows that in our judgment the complainant has no just cause of complaint against the defendants, and its suit must be dismissed with costs; and it is so ordered.

A petition for a rehearing was soon afterwards presented to Mr. Justice Field at Washington, with various suggestions as to the errors of the court in its findings. In disposing of it he delivered the following opinion:

Mr. Justice FIELD. This case was heard by me whilst holding the circuit court in San Francisco, in the month of September last, and was decided on the twelfth of October

following. The decision was against the complainant, and a decree was entered dismissing the bill. The complainant's counsel now present to me at Washington a petition for a rehearing.

The case was elaborately argued at the circuit, counsel occupying several days in the presentation of their views. Their arguments were taken down by a shorthand writer, and printed, thus enabling me to read what I had patiently listened to in the oral discussion.

The question before the court was the validity of the re-issued patent to the complainant. The main objection urged to its validity was that it was for a different invention from that described in the original patent. And upon that point the argument was full, elaborate, and able. It is difficult to see how the position of the complainant in support of the patent could have been more cogently presented.

The original patent was for a compound of nitro-glycerine with an inexplusive porous absorbent, which would take up the nitro-glycerine and render it safe for transportation, storage, and use, without loss of its explosive power. The reissued patent is for a compound of nitro-glycerine with any porous absorbent, explosive or inexplusive, which will be equally safe for transportation, storage, and use, without loss of explosive power. In other words, the reissued patent drops the limitation of the original, and seeks to cover all compounds in which nitro-glycerine is used in connection with a porous absorbent, in the production of blasting powder, thus practically securing to the patentee a monopoly of nitro-glycerine in the manufacture of that powder. The court held that the reissued patent was, therefore, more extensive in its scope than the original patent, and on that ground was invalid. It covered a different invention.

The court also held that the original patent was neither invalid nor inoperative from any defective specification, but was valid and operative for the invention described; and that this appeared upon a comparison of the two patents, the reissued patent differing from the original only in the extent of its claim; and that, therefore, the commissioner

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exceeded his jurisdiction in granting a reissue at all, as well as on the ground that the reissued patent was for a different invention. This latter position was not, it is true, discussed in the oral argument, but it is raised by the pleadings, and the attention of complainant's counsel at San Francisco was called to it, and a note of authorities on the point was received from them, embracing the greater part of those mentioned in the petition for rehearing. Whether the position be well taken or not cannot affect the decision of the case, if the reissued patent cover a different invention from that described in the original patent.

But the petition cannot now be considered by me at Washington. It is not an *ex parte* proceeding; it can only be presented on notice, and can only be considered after the other side has had an opportunity to answer it.

The *ex parte* presentation by counsel has evidently been made from a failure to distinguish between an application for rehearing after the decision of an appellate tribunal, and an application for a rehearing in a court of original jurisdiction after entry of a final decree. The distinction between applications for rehearing in the two cases is pointed out by Chief Justice Taney, in *Brown v. Aspden*, 14 How. 26: "By the established rules of chancery practice," said the Chief Justice, "a rehearing, in the same sense in which that term is used in proceedings in equity, cannot be allowed after the decree is enrolled. If the party desires it, it must be applied for before the enrollment. But no appeal will lie to the proper appellate tribunal until after it is enrolled, either actually or by construction of law. And, consequently, the time for a rehearing must have gone by before an appeal could be taken. In the house of lords in England, to which the appeal lies from the court of chancery, a rehearing is altogether unknown. A reargument, indeed, may be ordered, if the house desires it for its own satisfaction. But the chancery rules in relation to rehearings, in the technical sense of the word, are altogether inapplicable to the proceedings on the appeal. Undoubtedly this court may and would call for a reargument where doubts are entertained, which it is supposed

may be removed by further discussion at the bar. And this may be done after judgment is entered, provided the order for reargument is entered at the same term. But the rule of the court is this, that no reargument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion and desires a further argument on the subject. And when that happens, the court will, of its own accord, apprise the counsel of its wishes, and designate the points on which it desires to hear them."

According to the practice in the supreme court, if the court does not, of its own motion, desire a rehearing of a case decided, counsel are at liberty to submit without argument a brief petition or suggestion of the points upon which a rehearing is desired. If, then, any judge who concurred in the decision thinks proper to move for a rehearing, the motion is considered by the court; otherwise the petition is denied of course. (*Public Schools v. Walker*, 9 Wall. 604.)

A similar course of procedure would be appropriate in any appellate tribunal. To allow an argument upon such a petition would lead, in a majority of cases, to a mere repetition, with more or less fullness, of the points presented on the original hearing, and cause infinite delays, to the prejudice of other suitors before the court.

There is another observation to be made upon rehearings in equity after a final decree in courts of original jurisdiction. The practice in this country and that which formerly prevailed in England are essentially different. According to that practice in the English courts, a rehearing previous to the enrollment of a decree, when the petition was approved by the certificate of two counsel, was granted almost as a matter of course. Repeated rehearings in the same cause were not uncommon, and the consequent delays and expenses from this practice were so great as to lead to the interposition of parliament for its correction. This subject is mentioned by Chief Justice Taney in his opinion in the case in *Howard*. There, when a case was decided, memoranda for the decree were entered in the minutes of the

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court; in some instances the final decree was thus entered; but the decree was not considered as strictly a record until it was engrossed, signed, and entered at length in the rolls of the court. Between the time of the decision and the entry of memoranda for the decree, and the time the decree took a definitive shape by enrollment, it was open to modification and correction, and even to entire change. But when once enrolled the decree was not subject to change, except in the house of lords, or by a bill of review. (2 Daniels Ch. Pr., 1018.)

In this country there is not, except perhaps in one or two states where the old forms of equity practice are retained, any such proceeding as the formal enrollment of decrees. Here when a case in equity is decided, a decree is drawn up and signed by the judge and entered on the records of the court with about the same formality as a judgment in a case at law. And rehearings are then granted, except when the judge acts of his own motion, only upon such grounds as would authorize a new trial in an action at law; that is, for newly discovered evidence or errors of law apparent upon the record. All the limitations which control courts in actions at law in considering allegations of newly discovered evidence and of errors at law, apply to applications for rehearing in such cases. (*Bentley v. Phelps*, 3 W. & M. 403. See, also, *Doggett v. Emerson*, 1 Id. 1; *Emerson v. Daniels*, Id. 21; *Tufts v. Tufts*, 3 Id. 426; and, also, *Clapp v. Thaxter*, 7 Gray, 386.)

The course of procedure for the complainant, therefore, is to file its petition with the clerk of the circuit court at San Francisco and obtain from the court or circuit judge an order upon the defendants to show cause, on the following rule day, or some other day mentioned, why its prayer should not be granted. The defendants can then answer the petition, and upon the petition and answer the application can be heard. A rehearing should not be granted for newly discovered evidence where the evidence could have been obtained by reasonable diligence on the first hearing, nor when it is merely cumulative to that previously received, nor when if presented it would not have changed

the result. And as to errors of law, they should be such as are clearly shown by considerations not previously presented. A new hearing should not be had simply to allow a rehash of old arguments. The proper remedy for errors of the court on points argued in the first hearing is to be sought by appeal, when the decree is one which can be reviewed by an appellate tribunal. (See *Tufts v. Tufts*, *supra*.)

The petition, therefore, cannot be heard by me *ex parte* at Washington. The complainant must pursue the regular course of procedure and give notice to the opposite party. If the petition be filed during the term the court will retain jurisdiction over the case, and may subsequently decide upon the application. The eighty-eighth rule in equity applies only where no petition is presented during the term.

As the circuit court in San Francisco will be held by the circuit judge in my absence, he will direct its clerk to forward the petition and answer to me, at Washington, accompanied with such briefs as counsel may file within a reasonable time to be allowed by the court. The application will then be taken up and disposed of and my judgment sent to the circuit court and there entered. Where cases have been heard by the circuit judge sitting alone, I do not myself hear applications in them for a rehearing or motions for a new trial, except by his request. This consideration to the different judges composing the court is essential to the harmonious administration of justice therein. As observed by me in a case reported in 1 Saw.: "The circuit judge possesses equal authority with myself on the circuit, and it would lead to unseemly conflicts if the rulings of one judge, upon a question of law, should be disregarded or be open to review by the other judge in the same case." (P. 689.)

The petition contains what purports to be a copy of my opinion, but it is a copy of the opinion before it was revised. The opinion should not have been published until it had received my revision, as counsel very well know. In any petition, hereafter filed, it is expected that a correct copy will appear, if any one is given. If the present petition is used the opinion must be corrected in accordance with the revised copy.

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Before concluding, it may not be amiss to invite the attention of complainant's counsel to the language of Judge Story, in the case of *Jenkins v. Eldridge*, with respect to the earnestness with which counsel, in applying for rehearings, sometimes asseverate their convictions of the errors of the court, and to repeat what is there said, "that if any judge should be so unstable in his views or so feeble in his judgment as to yield to them, he would not only surrender his independence, but betray his duty. However humble may be his own talents, he is compelled to treat every opinion of counsel, however exalted, which is not founded in the law and the facts of the case, to be voiceless and valueless. (3 Story, 303.) Nothing can be gained by the strong language expressed by counsel in presenting the petition as to the supposed errors of the court, nor by the statement as to what may have been said of the decision by other counsel, who have neither examined, studied, nor understood the case.

A. J. POPE ET AL. v. SWISS LLOYDS INSURANCE
COMPANY.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

OCTOBER 13, 1880.

TIME POLICY—LIABILITY OF INSURERS—SEAWORTHINESS.—The insurers on a time policy made in this state and under its laws are not liable, if it appear that the vessel was not seaworthy at the commencement of the voyage on which the loss occurred.

Before HOFFMAN, District Judge.

LIBEL on policy of insurance. Defense, unseaworthiness of vessel insured.

H. McAllister, proctor for libelant.

Milton Andros, proctor for respondent.

HOFFMAN, J. Section 2681 of the Civ. Code of California is as follows: "In every marine insurance upon a ship or freight, or freightage, or upon anything which is the sub-

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ject of marine insurance, a warranty is implied that the ship is seaworthy." Section 2683: "When the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time." The policy in this case contains the following clause: "13. It is hereby further agreed by and between the assured and insurers that the provisions of the Civ. Code of California shall be conclusive and binding as regarding the warranty of seaworthiness, liability of insurers in case of prior, subsequent, or simultaneous insurance and such other questions as are therein legislated upon and not otherwise provided for in this policy."

The provisions of the code thus became doubly obligatory upon the parties. In the great case of *Gibson v. Small*, 4 H. L. Cas., 353, it was finally settled that by the law of England, on a time policy, effected on a vessel then at sea, there is no implied condition that the ship should be seaworthy on the day when the policy attached. Whether in a time policy there is not an implied warranty of seaworthiness at the commencement of the risk, so far as it is in the owner's power to effect it, and whether, where several voyages are contemplated, the owner is not bound to exercise reasonable care and pains to repair any damages the vessel may have sustained and to put her in a seaworthy condition before commencing a new voyage, was not decided. Even if it be considered that in such cases there is no technical warranty of seaworthiness, yet if the ship should come into a port in a damaged condition before or after the commencement of the risk, and the owner or his agent neglect to make reasonable and practicable repairs, and the vessel be lost in consequence, it would seem that sound policy, humanity, and due regard for the rights of shippers, should forbid a recovery by the owner from the insurers for a loss attributable to the insufficiency of the ship. (See opinion of Lord St. Leonards in *Gibson v. Small*, *ubi supra*; opinion of Lord Campbell, *contra*; also opinion of Mr. J. Grier in *Jones v. Insurance Co.*, Wall. jun. 280, 281.)

In this state, these questions are, as we have seen, defini-

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tively settled by the *lex loci contractus*. I have made the foregoing observations because it seemed to be supposed at the hearing that the provisions above cited of our code were a startling and unprecedented innovation upon well-settled and universally acknowledged principles. But this decision of the house of lords in *Gibson v. Small*, even if it should be deemed to be applicable to the present case, can not affect its determination. That must be controlled by the provisions of the code which have been cited, because: 1. They constitute the law of the place where the contract was made and where it was to be executed (1 Pars. Ins. 132; *Cox v. U. S.*, 6 Pet. 203; 1 Gall. 371); and, 2. Because the obligation of that law was expressly recognized and agreed to by the parties to the contract. The only question, therefore, to be considered is, Was there a breach of the implied warranty of seaworthiness at the commencement of the voyage on which the vessel was lost?

The schooner *Caroline Mills* was insured at this port for one year, from the fifteenth of April, 1878, "to be engaged as an inter-island trader among the Sandwich islands." She proceeded from this port to Hilo (Sandwich islands), where, by direction of her owners, she commenced a voyage from Hilo to Honolulu, *via* the way ports. On the ninth day of the voyage, after stopping and discharging cargo at several way ports, she was driven ashore and totally lost at the port of Honokau.

The defense set up is breach of the implied warranty of seaworthiness, in this, that the vessel was not provided with ground tackle reasonably fit to perform the services, and to meet the ordinary exigencies of the voyage contemplated by the parties. This is the only issue in the case, and upon it the evidence leaves in my judgment little room for doubt.

1. It is not denied that at the owner's suggestion the master "reinforced" his chain cables, by attaching to the anchors six-inch hawsers. This arrangement the experts condemn as improper and inadmissible, partly from the impossibility of dividing the strain with any approach to equality between a chain cable and a hempen hawser, ow-

ing to the great difference in elasticity of the materials of which they are composed, and partly from the liability of the hawsers to become chafed or be cut by the chain or by rocks on the bottom—a danger more than ordinarily great, in the inter-island navigation of the Hawaiian islands, owing to the presence, almost invariably, of coral reefs. The fact that this mode of strengthening his ground tackle was resorted to seems to involve the tacit admission that the cables alone were insufficient. The master himself testifies: "I knew the chains were old and weak, so I attached a hawser to the anchors to strengthen the chains." The mate, whose testimony is in some respects more favorable to the libelants than that of the master, says: "The reason the hawsers were attached to the anchors, was because the chain cables were weak."

2. The loss of the vessel does not appear to have been caused by any sudden, unforeseen, or irresistible violence of wind or sea. No storm prevailed. It is even doubtful whether the trade winds, which caused the vessel to part her cables, blew with any unusual violence. The master, who had been, as sailor and master, engaged in the inter-island navigation for thirty years, says: "The wind was as usual for that place—easterly trade winds moderately strong, and the usual long, heavy swell, and the surf on the rocks was not high." And he adds: "If the chains had held, the vessel would have been in no danger. The weather was perfectly safe for anchoring at Honokan. I have anchored there in much worse weather in safety."

The mate's account of the cause of the disaster is slightly different. He says: "It was occasioned by the wind and weather, which was heavier than usual. The wind was quite high that day, and this made the sea rough. I have been at that place seven times before; never saw it so rough before. * * * The wind was high and a heavy swell was setting directly on shore. The usual wind is more to the east, which sets the swell along the shore at this place."

It is apparent from this testimony that though the witnesses differ as to whether the wind blew with any unusual strength, yet they both agree in ignoring the existence of

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any storm or extraordinary violence of the elements which a well-found vessel could not have anticipated and successfully encountered. It appears from the mate's testimony that when the vessel had approached to within a couple of miles from the shore the master decided to "stand off shore again, and to wait a little longer to see if the weather would allow of his anchoring in safety." This was at six A. M. The mate then went below and did not come on deck again until half-past eleven A. M. at the anchorage where the disaster occurred.

I do not understand that the skill and competency of the master are impeached. His experience as master engaged in the inter-island navigation is of twenty years. He is still in the employ, and appears to retain the confidence of the owner. When, therefore, after deciding to stand off and wait until the weather should permit him to anchor in safety, he resolved to stand in and bring his vessel to anchor, it must be inferred that the state of the wind and weather were such as, in his judgment, to justify the attempt. The result showed either that he committed an inexcusable blunder in placing his vessel in a position where ground tackle of the usual and proper strength would be wholly incapable of holding her, or else that she was unprovided with such tackle; for it is to be noted that the vessel can scarcely be said to have come to anchor at all, for the chains and hawsers on both anchors parted almost instantly when the vessel surged upon them.

I think the proofs in the case leave no reasonable grounds for doubt as to which of the alternatives above stated must be adopted, and that the disaster must be attributed to the weakness and insufficiency of the ground tackle of the vessel, and not to the stupid temerity of the master in exposing his vessel to a visible and obvious peril, which he had no right to suppose her capable of encountering. I have not thought it material to enter upon the inquiry, whether the chains with which the vessel was provided were of sufficient size for a vessel of her tonnage engaged in the coasting trade from this port. The fact that it was thought necessary to reinforce them by hawsers is, as before remarked,

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an admission that they were not strong enough for the inter-island navigation on which she was about to enter, and the result showed that they were inadequate to meet the ordinary incidents of that navigation, or perform the service which the master felt justified in expecting of them.

Libel dismissed.

P. B. JOHNSON v. G. W. EBBERTS.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 25, 1880.

MALICIOUS ARREST.—The defendant caused the arrest of the plaintiff without probable cause, but not from any actual ill-will towards him or any specific desire to vex or annoy him, but for the purpose of finding out who had forged a certain note in his name, then in the plaintiff's possession, and which he had claimed to be valid and to have acquired in good faith: *Held*, that the arrest was malicious, because the defendant had no right to experiment in that way with the liberty and good name of the plaintiff; that the act was purposely wrong and unlawful and therefore malicious.

Before DEADY, District Judge.

John H. Reed, for the plaintiff.

Rufus Mallory, for the defendant.

DEADY, J. On October 9, 1879, the plaintiff, upon the complaint and affidavit of the defendant, was arrested at Pendleton upon the charge of uttering a forged note upon the defendant dated March 1, 1879, for two hundred and fifty dollars, payable twelve months after date, to J. A. Peek or order, and by the latter indorsed in blank, and taken thence to Junction, and there, after an examination before a magistrate, duly discharged.

This action is brought to recover damages for this alleged malicious prosecution of the plaintiff by the defendant. On the trial the jury gave a verdict for the defendant, which the plaintiff now moves to set aside. The complaint alleged that the prosecution was without probable cause and malicious, but this was denied by the answer; and these were

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the questions submitted to the jury. Malice is not to be *presumed* from the want of probable cause, but the jury must find the malice as a substantial fact in the case. (*Wheeler v. Nesbitt*, 24 How. 551; *Stewart v. Sonnenborn*, 8 Otto, 191; *Levy v. Brannan*, 39 Cal. 488.) But the want of probable cause is evidence of malice, and in cases where there is no evidence to the contrary, is sufficient to justify a verdict for the plaintiff. Where the facts are undisputed, the question of probable cause is simply one of law for the court; but where this is not so, the court must instruct the jury hypothetically, as to what is or is not probable cause, and the latter must apply the instructions to the facts found by them and give a verdict accordingly.

But the facts in this case, upon any view of them, do not, in my judgment, constitute probable cause for the arrest of the plaintiff. Peek, the party who indorsed the note to the plaintiff, was the defendant's nephew, and not a person of good standing at Eugene, the place where he lived. He indorsed the note to the plaintiff, who was a comparative stranger to him, and the neighborhood, for the right to make and vend a patent washer in the county of Lane. The plaintiff may have known or had reason to suspect that the note was forged, but his conduct in every particular, save probably one, indicated the contrary. The note being underdue was not presented to the defendant for payment, but assuming that the plaintiff was informed by the Osbornes, as they testify and he denies, that Ebbert had told them the note was not genuine, I think it a singular circumstance that the plaintiff did not go to the defendant and make some inquiry of him concerning the matter. Finally the defendant had Peek arrested for the forgery, who upon the examination before the magistrate was discharged; but afterwards, and subsequent to the arrest and discharge of the plaintiff, he was indicted for the offense and convicted upon the plea of guilty.

When the defendant caused the arrest of the plaintiff, he had no information tending to make it appear that he had been guilty of any crime in relation to the note, except the unverified statement of Peek, that the note was forged

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at Roseburg, and the plaintiff had a hand in it, and that he, Peek, had only indorsed it. But this statement ought not to have been believed or acted upon, because: 1. Peek was not generally, nor in the estimation of the defendant, a reliable person—he had just charged him upon oath with the forgery of this same note; 2. He was confessedly a party to the forgery; and 3. It was apparent from the face of the note, and the date of the conversation between the defendant and the Osbornes, that the note was made some weeks before the plaintiff went to Roseburg.

The plaintiff testified that the reason he had the defendant arrested was “he had my note, and I wanted to know how he got it.” But no one has a right to cause the arrest of another as an experiment, for the purpose of finding out who committed a particular crime. This is trifling with the liberty and good name of another, which the law does not justify or excuse. But it must appear that the arrest was malicious, as well as without probable cause, before the defendant can be held responsible in damages. It is not claimed that there is any direct evidence of malice, but only that it is sufficiently shown by the circumstances of the case. The malice necessary to sustain this action is not express malice, a specific desire to vex or injure another from malevolence or motives of ill-will; but the willful doing of an unlawful act to the prejudice or injury of another. (*Frowman v. Smith*, 12 Am. Dec. 268.)

Tried by this standard, I think the weight of evidence in this case is that this prosecution was malicious—was purposely wrong and without justifiable cause. The jury, in coming to a contrary conclusion, must have misunderstood the charge of the court upon this point, or been misled by the eloquent appeal of the counsel for the defendant upon the relative merits of patent-right peddlers and farmers.

This may not be a case for exemplary damages, for admitting, as we must, the plaintiff's innocence, yet to his indiscretion in the purchase and attempted disposition of this note may be attributed in some measure the suspicions which led to his arrest. But, nevertheless, the defendant having without sufficient cause and in willful disregard of

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the plaintiff's rights, caused his arrest, for the purpose of finding out who forged this note—thus experimenting with his liberty and good name—ought not to be absolved from all the consequences of his mistake or misconduct.

The motion for a new trial is allowed, with costs to abide the event of the action.

IN RE FRANK CAMILLE, PETITION TO BE ADMITTED
TO CITIZENSHIP.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 2, 1880.

NATURALIZATION—WHITE PERSON.—A person of half white and half Indian blood is not a "white person" within the meaning of this phrase as used in the naturalization laws, and therefore he is not entitled to be admitted to citizenship thereunder.

Before DEADY, District Judge.

The Petitioner, in propria persona.

DEADY, J. Frank Camille petitions to be admitted to become a citizen of the United States under section 2167 of the R. S., as an alien who has resided in the United States the three years next preceding his arriving at the age of twenty-one years, and without having made the declaration of his intentions in that respect required in the first condition of section 2165 of the R. S. From the evidence it appears that the applicant was born at Kamloops; in British Columbia, in 1847, and at the age of seventeen came to Oregon, where he has ever since resided, and that he is otherwise entitled to admission, if he is a "white person" within the meaning of that phrase, as used in section 2167 of the R. S., as amended by the act of February 18, 1875. (18 Stat. 318.) His father was a white Canadian and his mother an Indian woman of British Columbia, and he is therefore of half Indian blood.

In *In re Ah Yup*, 5 Saw. 155, it was held by Mr. Justice Sawyer that the words "white person," as used in the

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naturalization laws, mean a person of the Caucasian race, and do not include one who belongs to the Mongolian race. In the course of the opinion he says: "Words in a statute, other than technical terms, should be taken in their ordinary sense. The words 'white person,' as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But these words in this country, at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly so used in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race."

For the same reasons, it appears that the words "white person" do not and were not intended to include the red race of America. Chancellor Kent, in considering this subject (2 Com. 72), says that "it may well be doubted" whether "the copper-colored natives of America or the yellow or tawny races of the Asiatic" "are 'white persons' within the purview of the law."

In all classifications of mankind hitherto, color has been a controlling circumstance, and for that reason Indians have never, ethnologically, been considered white persons or included in any such designation. From the first, our naturalization laws only applied to the people who had settled the country—the Europeans or white race—and so they remained until in 1870 (16 Stat. 256; R. S., sec. 2169), when, under the pro-negro feeling generated and inflamed by the war with the southern states and its political consequences, congress was driven at once to the other extreme, and opened the door not only to persons of African descent, but to all those "of African nativity"—thereby proffering the boon of American citizenship to the comparatively savage and strange inhabitants of the "dark conti-

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ment," while withholding it from the intermediate and much better qualified red and yellow races.

However, there is this to be said in excuse for this seeming inconsistency, the negroes of Africa were not likely to immigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst and at our doors, and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them.

The conclusion being that an Indian is not a "white person" within the purview of the naturalization laws, the question arises, What is the status in this respect of the petitioner, who is a person of one half Indian blood? In Louisiana, if the proportion of African blood did not exceed one eighth the person was deemed white; and this was the rule in the colonial code *noir* of France, and approved in Carolina. (2 Kent, 72, note b.)

In Ohio it has been held that a person nearer white than black or red was a white person, within the provision in the state constitution of 1802, limiting the privilege of voting to the "white male inhabitants," etc., but that where the colored blood was equal to or preponderated over the white blood, the person was not white.

In *Jeffries v. Ankeny*, 11 Ohio, 372, it was held that the offspring of a white man and a half-breed Indian woman was a voter; "that all nearer white than black, or of the grade between the mulattoes and the whites, were entitled to enjoy every political and social privilege of the white citizen." (See *Gray v. The State*, 4 Id. 353; *Thacker v. Hawk*, 11 Id. 377; *Lane v. Baker*, 12 Id. 237.)

Upon these authorities, and none other have come under my observation, the petitioner is not entitled to be considered a white man. As a matter of fact he is as much an Indian as a white person, and might be classed with the one race as properly as the other. Strictly speaking, he belongs to neither.

The power to say when and under what circumstances aliens may become American citizens belongs to congress.

Points decided.

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Citizenship is a privilege which no one has a right to demand; and in construing the acts of congress upon the subject of naturalization, the courts ought not to go beyond what is plainly written. The petitioner is not a "white person" in fact, nor can he be so considered upon any reasonable construction of the statute or within any rule that has ever been promulgated on the subject.

The application is denied.

THE CHANDOS AND HER MASTER—R. T. EMERY,
CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.

NOVEMBER 9, 1880.

1. CRANE-LINE.—The primary purpose of a crane-line is to steady the back-stays, and in blustery weather it is very apt to chafe and wear out where it is fastened to the stays; and, therefore, it ought not to be used as a foot-rope without caution and the aid of the stays.
2. SAME.—The weather being wet, the night dark, and the wind strong, the libelant was ordered to go aloft and cast off the stop on the foretop-gallant halyards, which he did by going up the rigging and out on the crane-line to the space between the topmast and top-gallant-stay, and there untying the stop with both hands while he sat upon the crane-line, without any other hold or security, and, just as the stop was cast off, the line parted near the top-gallant-stay, and the libelant was precipitated to the deck and seriously injured: *Held*, that the injury was caused by the negligence of the libelant in going on the crane-line without an opportunity of examining its condition and without holding to the stays by his arms or legs, or both, while casting off the stop; and that if, by reason of the negligence or misconduct of the mate, the crane-line was insufficient, still the libelant could not recover damages for the injury, because even then his own negligence substantially contributed to the result.
3. FELLOW-SERVANT.—*Seemle*, that the mate is not the fellow-servant of a sailor so as to exempt the master from liability for an injury caused to the latter by the negligence of the former.
4. DEVIATION.—A departure from the due course of a voyage, to save property merely, is a deviation and will forfeit the insurance; but a departure to save life is not. But although the law will, as between the insurer and insured, excuse a departure from motives of humanity, a master is not correspondingly bound to make such departure, even to save the life of one of the crew; but the time and risk likely to be consumed and incurred in such departure, as compared with that incident to the

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Statement of Facts.

direct voyage, are to be considered, and have a controlling influence in the matter.

5. SAME.—On June 10th, in latitude 38° south and longitude 91° west, the ship *Chandos* was on her way to Portland, Oregon, with a cargo of railway iron, without a surgeon or any surgical appliances on board, when the libellant fell from aloft and broke his thigh bone: *Held*, that if the ship could have made a port—as, for instance, Valparaiso, distant about 1,080 miles—in five or six days, it would have been the duty of the master to have gone there and obtained surgical aid for the libellant; but if it could not have been done in less than two weeks, he was not bound to make the departure.
6. SICK OR INJURED SEAMEN.—The hospital service of the United States is not intended to supersede the marine law, which imposes an obligation on a vessel to take care of a seaman falling sick or becoming injured in its service, but only auxiliary thereto.
7. SAME.—A seaman injured in the service of a vessel, without his fault, is entitled to be taken care of, at the expense of the vessel, until the end of the voyage, and longer, if necessary to effect a cure, so far as the same can be done by the use of the ordinary medical means; and the fault which will exempt a vessel from such liability is not mere ordinary negligence consistent with good faith, but some positively vicious conduct, such as gross negligence or willful disobedience of orders.
8. NEGLECT TO SEND SEAMAN TO HOSPITAL.—Damages allowed for neglecting to send libellant to the marine hospital at Portland, at the expense of the ship, for twelve days after her arrival in the Columbia river.

Before DEADY, District Judge.

In January, 1880, the American ship *Chandos* sailed from the port of New York for Portland, with a full cargo of railway iron. The libellant, Gustavus Peterson, a native of Sweden, and aged twenty-seven years, shipped for the voyage as an able-bodied seaman. Near three o'clock of the morning of June 10th, in about latitude 38° south, longitude 90° west from Greenwich, the weather being dark and rainy, with a good breeze, the libellant was ordered by the second mate to go aloft and cast off the stop on the foretop-gallant halyards. He went up the rigging on the starboard side to the top, and thence out on the crane-line and stood or sat upon it—probably the latter—between the topmast and top-gallant backstays, while, without other hold or support, he untied with both hands the stop, which was about eighteen inches or two feet above the line. Just as the libellant finished untying the stop, the line on which

he was resting parted at the hitch near the top-gallant stay, and precipitated him to the deck. In falling, he appears to have struck first on one foot on the ship's boat, which was stowed bottom up on the booms just abaft of the foremast, and then fell over on the deck, striking his head on the pin-rail as he went down. The distance from the crane-line to the bottom of the boat on which libelant struck is about thirty feet, and from there to the deck is about ten feet more.

The alarm was soon given and the man was immediately carried into the house on deck, used as a forecastle, in an unconscious condition, and bleeding profusely from what appeared to be a severe injury to the head. The master was called, and came at once to the forecastle, and had the libelant stripped and examined, placed in a bunk, and dressed his head. The fall caused a fracture of the collar-bone, and a severe cut in the head, from which the libelant in due time fully recovered. It also caused a fracture of the femur or thigh-bone of the right leg a little below the middle of the same.

On the next day after the accident the master had the libelant removed into the carpenter's room and his leg bandaged with splints and placed in a box then made for that purpose. There seems to have been a difference of opinion on board as to whether the leg was broken or not—the master's testimony being that he did not think it was broken until July 4th, when the vessel was in latitude about 2° north, and longitude 110° west, at which time he became satisfied that it was broken.

The *Chandos* arrived in the Columbia river on August 10th, and anchored in Baker's bay, where she remained ten days, and then proceeded to Portland, where she arrived on August 22d. There the libelant was sent to the marine hospital, where he remained about two months. From the evidence of the hospital physicians, the bone has united and the leg will in all probability be strong and sound, but it is about three inches short; the knee is also somewhat stiff, but that will probably pass away.

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John and Charles Woodward, for the libelant.

John W. Whalley and M. W. Fechheimer, for the respondent and claimant.

DEADY, J. The libelant brings this suit against the vessel and the master to recover five thousand dollars damages for the injury suffered by the fall and the subsequent inattention—alleging that the fall was caused by the neglect of the master in not providing a sufficient crane-line, and that the shortening of his leg was caused by neglect and the want of proper treatment after the fracture.

Upon the first point I find against the libelant. From the evidence, it plainly appears that the crane-line is not primarily a foot-rope, and that it is put upon the stays to keep them steady, and not to walk upon, but that it is often used by seamen, more or less, as a support or rest in going from the top to the stop and casting it off. It also appears that this line, which is usually on this vessel a fifteen-thread ratline, is very liable to chafe and wear from the swaying of the stays; so that sometimes it only lasts a day or so, and is therefore considered an insecure footing, and one that ought not to be used without other support, or more than ordinary caution.

As an evidence of how soon this line may become chafed and weakened, and therefore of its insecurity as a foot-rope, it may be mentioned that on the evening before the libelant was hurt, as he came down from furling the sail he sat with all his weight upon this same crane-line while he put on this same stop. And yet it broke with him under similar circumstances eight hours thereafter. When, therefore, the libelant, who appears to be a man above the average weight, went upon this line in the dark, without any precaution against its breaking, or observation as to its then condition, I think he was guilty of negligence. The libelant assumed the ordinary risks of his employment, and the liability of the crane-line to part appears to be one of them. The negligence of the libelant was the proximate, if not the sole, cause of the injury; and, therefore, he can not recover

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from the damages resulting from it. (2 Thomp. on Neg. 1148; *Bowus v. Pioneer Tow Line*, 2 Sawy. 21.)

But the libelant also claims that the crane-line was insufficient when put up, a few days before, by the express direction of the mate—being only a piece of old rotten manila gasket; that he went upon the crane-line to cast off the stop by the special order of the second mate, and that it was customary on the vessel in giving an order to cast off this stop, to say: “Go aloft, and get on that crane-line and cast off the stop on the top-gallant halyards.”

But, in my judgment, the evidence fails to establish either of these allegations; and, if it did, the libelant would not thereby be relieved from the obligation to exercise ordinary care and prudence in going on such line, or casting off such stop.

Admitting, however, the alleged negligence of the mate, and that the master or owner and the vessel are liable therefor, still, if the negligence of the libelant substantially contributed to produce the injury, he could not recover damages therefor. In this view of the matter it is unnecessary to consider whether the mate was a fellow-servant of the libelant, within the general rule which exempts a master from responsibility for injuries to those in his employ resulting from the negligence of a fellow-servant employed in the same general business.

In *Halverson v. Nisen*, 3 Saw. 562, the libelant, while at work upon a triangle, fell to the deck, by reason of the negligence of the mate in rigging the same, and was seriously injured. Mr. Justice Hoffman, upon the strength of the authorities, but with apparent reluctance, held that the owners of the vessel were not responsible for the injury. But the mate being the immediate agent and representative of the master—his very right hand as it were—acting within his view and under his personal direction, I think he ought not to be considered the fellow-servant of the men in the forecastle, within this rule, but rather the *locum tenens* of the master and owner, for whose negligence, resulting in injury to any of the crew while in the correct dis-

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charge of their duty, the vessel and master ought to be responsible.

The relation between the master and sailor at sea is more of a parental character than that between the employer and employee on shore—particularly in the great transportation lines, workshops and factories of modern times; and therefore the former may and do rely more for their safety and well-being upon the foresight and personal direction of those in authority over them than the latter. Again, an employee on shore, who is unwilling to incur the risk arising from the negligence or want of skill of a fellow-servant, may ordinarily quit such employment, but a seaman must remain on board, at least until a port is made, however unskillful or negligent the mate may be.

In the argument for the respondent and claimants, significance was sought to be given to the fact the libelant went aloft in his oilskins and gum boots and by way of the rigging instead of “shinning up the backstays.” But in this instance it is too plain for argument that the libelant’s fall was not in any way attributable to the amount of clothing he wore or the way in which he went aloft, but solely to the means he adopted of supporting himself while there—the resting his whole weight upon the crane-line without being aware of its condition. From the evidence and the very nature of the case, I am satisfied that it was just as proper, and much easier and safer, to have climbed up the rigging and swung out on the backstays, to cast off this stop, as to have shinned up the stays for that purpose. Under ordinary circumstances an active, light man might adopt the latter way, while a heavy, loggy one, particularly at night in rough weather, would very naturally prefer the former.

The second point made by the libelant is not so easily disposed of. It is the well-settled law that a seaman receiving an injury or becoming sick in the service of the ship, without his fault, is entitled to be cured or cared for at the expense of the vessel. (*Harden v. Gorden*, 2 Mass. 547; *Reed v. Canfield*, 1 Sum. 197; *The Ben Flint*, 1 Abb. U. S. 128; *Brown v. Overton*, Sprague Dec. 462.) And the fault which will forfeit this right upon the part of the seaman

must be some positively vicious conduct—such as gross negligence or willful disobedience of orders. Ordinary negligence, consistent with good faith and an honest intention to do his duty, is not sufficient. (*Reed v. Canfield, supra*, 206; *The Ben Flint, supra*, 130.) The propriety and good policy of this rule is eloquently vindicated by Mr. Justice Story in *Harden v. Gorden, supra*, 547, and in the application of it a court of admiralty will not be quick to find cause to exclude the seaman from its benefits.

The libelant, notwithstanding his want of caution in going upon the crane-line, was clearly entitled to be cared for at the expense of the ship, and the question now is, What was the nature and extent of this obligation. It is not contended by counsel for the libelant that the ship ought to have been furnished with a surgeon or that the master should have had more than ordinary knowledge and experience in ascertaining or treating fractures of the leg.

But it is claimed that if the master had exercised ordinary skill and care in the examination and treatment of the libelant's leg he would have ascertained that the thigh-bone was fractured and have been able to set it so that it would not now be three inches short; and, also, that it was the duty of the master under the circumstances to have gone into the nearest port, Valparaiso, where it is admitted that proper surgical aid and appliances could have been obtained. Upon the evidence it is very uncertain what time it would have taken to reach Valparaiso from the place where the accident occurred—a distance of eighteen degrees east and five degrees north. Counsel for the libelant argues that it might have been done in eleven days, but the calculation upon which this conclusion is based assumes that the vessel might have changed her course from about north-west to east and made about four miles an hour to Valparaiso.

Now there is no evidence in the case as to the force or direction of the wind between the locality of the accident and the latter place, and we are therefore left almost to conjecture as to the time that would have been consumed in making the detour. The burden of proof is upon the libelant to support his allegation that the master failed to do his

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duty towards him in this respect. If it had been shown that the vessel could, under the circumstances, make about ten miles an hour, and thereby have made Valparaiso in a little more than five or six days, it might have been proper for the master to have gone in there; indeed, I think it would have been his duty to do so. But as it is, I do not think it would be safe to assume that this port could have been made in less than two weeks, and I do not think that the vessel was under obligation to make that sacrifice of time and risk of cargo for the libelant.

In *Brown v. Overton*, *supra*, the libelant fell from aloft and broke both his legs below the knees. The master set them as well as he could, and yet they were permanently deformed and disabled. The accident happened twenty-five days' sail from St. Helena, and the course of the vessel was within eight or ten hours from that port, but the master refused to touch there for surgical aid. Mr. Justice Sprague held it was the duty of the master to have gone in, although it was doubtful whether the deformity could have been prevented or cured at that late day. No other case at all in point has been cited on this question; and while it proves it is the duty of the master to seek surgical aid for a wounded seaman while there is any chance of its being useful, yet it by no means follows that it is his duty to do so at any sacrifice or risk to the vessel or voyage. There must be some limit to the obligation to seek aid outside of the vessel. A fall from aloft is an incident of a seafaring life, and the law can scarcely be that in such a case surgical aid must be sought to the serious hindrance or delay of the voyage and the liability of the cargo to depreciation in the port of destination, or the delay or loss to some important enterprise undertaken upon the faith of its due delivery.

It is also urged by counsel for the respondent that under the circumstances any departure from the prescribed course of the voyage to obtain aid for the libelant would have been a deviation and caused a forfeiture of the insurance upon the vessel and cargo. The rule of law is that a delay by departure from the due course of a voyage to save property merely is a deviation, but to save life is not. (*Crocker v.*

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Jackson, Sprague Dec. 142; *The Boston and Cargo*, 1 Sum. 335; *The Eubank and Cargo*, Id. 424; *Bond v. The Cora*, 2 Wash. 84.

Whether a departure in such a case as this can be considered as made to save life may be a question. As between the insured and insurer, if there is any doubt about it, it should be resolved in favor of the former. I have found no case exactly in point, and in the mean time will say with Mr. Justice Washington, in *Bond v. The Cora*, *supra*, that "I will not be the first judge to exclude such a case from the exceptions to the rule," that a deviation works a forfeiture of the insurance. But the law in the interest of humanity will, as between the insurer and insured, justify a departure from the course of the voyage to save life in cases where the vessel is under no legal obligation to do so, and therefore, even if the *Chandos* might have gone to Valparaiso to save the life or limb of the libelant without forfeiting her insurance, it does not follow that the master was bound to make such departure. For the like reasons and stronger, which excused the master from going into Valparaiso, he was not bound to put into any port south of San Francisco, and when he reached the point—39° 30' north latitude, 140° 20' west longitude—from which it was convenient to make the latter port, he was quite as near the mouth of the Columbia as the Golden Gate, and was therefore justifiable in preferring the former, as it was on the course of his voyage.

As to the treatment of the libelant on board the *Chandos*, it does not appear that there is any just ground of complaint, unless it be that the master ought to have ascertained that his leg was broken before he did, and at once. His own testimony is to the effect that he did not conclude the leg was broken until July 4th, and that is the entry in his log. But of the truth of this I am in doubt, because it appears that he treated the limb as if it was broken, as far as the appliances within his command would permit. He had the leg bandaged with splints and put in a box the next day after the accident. His present explanation of why he used the box is that it was to keep the leg from "slatting" (rolling) around with the motion of the ship; and that very

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circumstance, it seems to me, ought to have led to an examination that would have disclosed the fact that the femur was fractured. Still, it does not appear that the master, with the means at his command, could have cared for the leg any better than he did, even if he had been certain that it was fractured.

From the evidence, it appears that the fracture was caused by the fall from the crane-line to the boat and striking on the foot, and therefore it was probably oblique and attended with more or less displacement, the upper part of the bone turning upwards and the lower part pushing downwards and backwards and by the other. (2 Holmes Sys. Surg. 861.) In such a case, it appears from the books that if the subject is an adult, whose muscles are not paralyzed, and therefore offer the ordinary resistance to extension, more or less shortening—from one quarter to one and one-half inches—will always be the result, even where the case is treated by skillful surgeons, with the best appliances; nor will a shortening in such case of even three inches necessarily imply unskillful treatment. (Hamilton Prin. and Prac. Surg. 291; Id., Prac. and Dislo. 397; 2 Holmes Surg. 865; 1 Elwell Med. Jur. 97.)

It only remains to consider the case after the arrival of the *Chandos* in the Columbia river. And first, it is well to state that the obligation of the ship to take care of the libellant, and do what could be done for him under the circumstances, continued until the vessel arrived at Portland—the end of his voyage—and even longer, if the libellant still required nursing or medical treatment. And the fact that the libellant was entitled to admission into the marine hospital at Portland did not excuse the ship from this obligation, because that was his personal privilege or right, which he might avail himself of or not, as he saw proper. As was said by Mr. Justice Story in *Reed v. Canfield*, *supra*, 200, 202, the hospital service in the ports of the United States does not supersede the marine law on this subject, but is only auxiliary to it; and notwithstanding this, the seaman is entitled “to be cured, at the expense of the ship, of the sickness or injury sustained in the ship’s service. * * *

The expenses incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing or other assistance, are a charge on and to be borne by the ship; * * * and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from any further liability."

When the *Chandos* arrived at Baker's bay, according to the testimony of the experts, there was still a chance that the leg might be reset so as not to be more than one and a half inches short. At least, the libelant was still on his back from the effects of the injury, with a leg which was manifestly three inches short. Under the circumstances, it was the bounden duty of the master to have procured surgical aid and advice at once and see if anything could be done to give the unfortunate man the use of his limb. This aid could have been obtained from Fort Canby, which was almost within hail, or Astoria, only a few miles distant, or by sending the libelant to Portland.

But the master left the vessel at once and after reporting the case to the collector at Astoria, who it seems advised that the libelant be kept on board until the vessel reached Portland, washed his hands of the matter, and proceeded to the latter place on business, without even making arrangements for a surgeon to visit the libelant on board the vessel. Upon his return to the vessel on August 14th, four days afterwards, he informed the libelant what the collector said, and added that the libelant was now in the hands of the collector, and that he, the master, had nothing to say, but advised him to remain where he was, as it would cost him forty dollars to go to Portland, besides the risk of moving from boat to boat.

When the vessel came to Astoria on August 20th, the master, instead of calling a surgeon then to see the libelant, at the expense of the vessel, wrangled with the collector about employing one until the latter sent a surgeon on board, who simply advised, as the vessel was going directly to Portland, where there was a marine hospital, that the examination of his case be deferred until he reached there. In all this conduct of the master there appears to

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have been a manifest neglect of duty and purpose to shirk the expense of giving the libelant the attention he was entitled to. The libelant was not in the hands of the collector, unless he had actually been delivered into his charge as the agent of the marine hospital service, of which there is no pretense; nor was the expense of transporting the libelant to the hospital at Portland, in advance of the vessel, a proper charge against him under any circumstances, but it should have been paid by the vessel unless the transportation was furnished by the hospital service.

In this matter I fear the master was actuated by a desire to save expense to the vessel, of which it appears from the answer that he is a part owner. In a spirit of petty parsimony he appears to have denied the libelant a chance to have his fractured leg reset and made comparatively useful, rather than incur the trifling expense of sending him from Baker's bay to the hospital at Portland. For this dereliction of duty the master and the vessel are responsible to the libelant in damages. The amount of these, of course, must be limited by the uncertainty as to whether an immediate removal to the hospital would have been of any substantial benefit to the libelant.

In *Brown v. Overton*, *supra*, which is in many of its circumstances a similar case to this, the master neglected to send the libelant, who had fallen from aloft and broken both his legs seventy days before, to a hospital for three or four days after the vessel arrived at the port of Boston, and damages were allowed for such neglect, as well as the refusal to put into St. Helena for surgical aid twenty-five days after the accident occurred, amounting to six hundred dollars. In fixing the amount of damages in this case the court will not overlook the fact that the general treatment of the libelant by the master has been kind and considerate, nor that the principal and only fault in his conduct seems to have arisen from a desire to save for the ship at the expense of the libelant. Under the circumstances I think the libelant ought to recover at least two hundred and fifty dollars, and a decree will be given against the ship and master accordingly.

HERMAN SHAINWALD, ASSIGNEE, ETC., v. HARRIS
LEWIS.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 5, 1880.

FRAUD—CONSPIRACY—COLLUSIVE JUDGMENT—FICTITIOUS INDEBTEDNESS—
FABRICATED ANTEDATED NOTES.—Where members of an insolvent
firm, with intent to defraud firm creditors, conspired with a person to
whom the firm was indebted in only a small amount to have an attach-
ment levied on the firm property, and a judgment to be taken upon fic-
titious and antedated firm notes fabricated for the purpose, and to
transfer to him all the firm property then *in transitu*, and for which the
firm held bills of lading; and, in pursuance of such conspiracy, judgment
was recovered, the firm property sold on execution and bid in by the
plaintiff in the collusive suit, and the remaining property of the firm
secretly transferred to him: *Held*, that he was liable to the assignees in
bankruptcy, as representative of the firm creditors, for the value of all
of the firm property so fraudulently obtained by him, and will be de-
creed a trustee of such property and of its proceeds for the benefit of the
firm creditors represented by the assignee.

Before HOFFMAN, District Judge.

James L. Crittenden, for plaintiff.

Henry E. Highton, for respondent.

HOFFMAN, J. The complainant seeks by his bill in equity to have a certain judgment, execution, sheriff's sale and other proceedings in a suit at law in the nineteenth district court of this state, entitled *Harris Lewis v. Louis S. Schoenfeld, Isaac Newman and Simon Cohen*, declared to be a fraud upon the creditors of the firm of Schoenfeld, Cohen & Co., and upon the complainant, as their assignee in bankruptcy, upon Simon Cohen, and upon said firm; also, that it be declared and decreed that certain promissory notes upon which the suit was brought, to wit, a note for seventeen thousand dollars, a note for eight thousand dollars and a note for five thousand dollars, were fraudulent and void as against said firm for want of consideration; also, that it be declared and decreed that certain transfers of money, bills of lading, promissory notes and other property, to the respondent by said Schoenfeld and Newman

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were fraudulent and void as against the creditors of said firm, upon the complainant as their assignee, and upon Simon Cohen, one of the members thereof; also, that it be declared and decreed that the respondent is a trustee for the benefit of the complainant, of all the moneys, bills of lading, accounts, merchandise, chattels and other property obtained by said Lewis through, or by means of said action, attachment, judgment, execution, or sheriff's sale, or transferred or delivered to, or received by him from said Schoenfeld, from said Newman, or from any other person, and also for such further and other relief, etc.; also, for an injunction and writ of *ne exeat*.

The facts and circumstances which constituted the fraud are particularly and fully set forth in the bill. Its allegations are sustained beyond all doubt or denial by the proofs. It is perhaps not easy to imagine a grosser case of conspiracy by merchants of fair repute to cheat and defraud their creditors, or one where the proofs could be more convincing and indisputable. The testimony is very voluminous. But the evidence to establish the fraud is that of seven witnesses only, viz., Lewis, Newman, Hyams, Schoenfeld, Naphtaly, Sharp and Bremer, nearly all of whom were active participants in the fraud, either at its inception or during its progress, or at its consummation.

I shall not attempt to give a detailed account of the various transactions by which the respondent, at the instance and by the aid of Newman and Schoenfeld, two of the three members of the firm, succeeded in getting possession of the entire assets of the partnership to the exclusion of all its eastern and foreign creditors and of nearly all its creditors in this state. It will be sufficient to state the nature and effect of the fraudulent conspiracy and in a general way the means by which those objects were attained.

The firm of Schoenfeld, Cohen & Co. was composed of three partners, Louis S. Schoenfeld, Isaac Newman and Simon Cohen. Its capital was thirty thousand dollars, contributed fifteen thousand dollars each by Schoenfeld and Newman. Cohen was to contribute for a certain period his skill and experience in the business, and thereafter to fur-

nish fifteen thousand dollars to the capital, or pay interest on such portion thereof as he should fail to furnish. Each partner was to be at liberty to draw two hundred and fifty dollars per month for personal expenses.

In January, 1877, it was determined between Schoenfeld and Newman that the former should proceed to the eastern states and Europe to procure, if possible, a large stock of goods on credit. Aware that their credit would depend upon their financial standing here, and knowing that if the true condition of their affairs was disclosed Mr. Schoenfeld's expedition would prove abortive, they presented to one of the banks of this city a false statement of their profits and business affairs, sustained by false entries in their books as to their profits and the amount of money loaned to the firm by Newman. Having thus firmly established their credit, Schoenfeld proceeded to the eastern states and to Europe, and succeeded in purchasing goods to the amount of more than thirty thousand dollars, cost price.

Whether at the time the false credit was obtained and Mr. Schoenfeld started for Europe to make his purchases, it was the intention of Newman and Schoenfeld to cheat the foreign creditors out of the whole price of any goods the firm might succeed in obtaining by false pretenses as to their financial condition, or whether that project was formed after Mr. Schoenfeld's return, does not clearly appear. It is certain, however, that the preliminary steps for the perpetration of the fraud were taken immediately on his arrival.

Mr. Schoenfeld returned to the city early in June, 1877. On the succeeding day he met Newman by appointment at their store, where the affairs of the firm were discussed. A subsequent meeting was soon after held, at which Mr. Wm. Bremer, Mr. Hyams and Mr. Lewis were also present.

For the full understanding of the agreement entered into at this meeting, some explanation is necessary. The fifteen thousand dollars contributed to the capital of the firm by Schoenfeld had been obtained by him by a loan of eight thousand dollars from an old friend and former employer, Mr. H. Bremer, for which he had given his individual notes.

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He had paid in, in cash, two thousand dollars. The remainder, five thousand dollars, he had borrowed, on his individual note, from Newman, who claimed that the money belonged to a Mrs. Alexander, by whom it had been placed with him for investment. Newman had paid in cash the whole of the fifteen thousand dollars to be contributed by him to the capital. He had also lent the firm on the firm's notes eighteen thousand dollars. These notes were then held by the London and San Francisco Bank, having been hypothecated by Newman to secure a private loan of six thousand dollars. The money had been originally obtained, as Newman asserted and as appears to be the fact, from the respondent, and there is evidence tending to show that Newman had, without the knowledge of his partners, executed a note in the firm name to Lewis for seventeen thousand dollars of the amount. On this point the testimony is conflicting. It is not material. For the note, if executed, was a fraud upon his other partners, and the respondent well knew that the firm note to Newman for the loan was outstanding. It had, in fact, been transferred by Newman to Lewis, and had been by the latter lent to Newman to enable him to deposit it as collateral security for his loan from the bank.

At the first meeting nothing definite was effected. At the next meeting Mr. Newman explained the embarrassed condition of the firm. He stated that he owed twenty thousand dollars, viz., the eighteen thousand dollars already mentioned and two thousand dollars which Lewis had loaned to the firm, and for which he held their genuine note; that Lewis was his only friend in the world, etc., and he insisted that he should be protected. Mr. Schoenfeld replied that if Lewis was to be protected, his confidential creditor should also be secured. This was assented to, and it was agreed that a firm note for eight thousand dollars should be executed to Bremer, "so that the eight thousand dollars should stand valid against the firm instead of against an individual member in case any action should be taken." This was accordingly done on the succeeding day. The note was delivered to Mr. William Bremer, agent for H.

Bremer, who was to hold it for presentation as a firm debt in case any suit was brought against the firm. Mr. Bremer did not then, nor at any time up to the trial of this cause, surrender the individual notes of Schoenfeld originally given by the latter to his brother.

A few days subsequently Mr. Schoenfeld received a peremptory notice from the Anglo-Californian Bank to make good the firm's indebtedness. This notice he communicated to Mr. Newman. A meeting was at once held to make arrangements for the consummation of the fraud which was in contemplation. It was held in the private office of Lewis, and was attended by Schoenfeld, Newman, Lewis, and Mr. Naphtaly, as legal adviser. Its avowed object was to defraud the firm creditors by placing the entire assets of the firm in Lewis' hands, who was first to satisfy Newman's indebtedness to himself and the firm's indebtedness to him of two thousand dollars. He was also to pay Schoenfeld's individual indebtedness of eight thousand dollars to Bremer, and also the balance of his indebtedness of four thousand dollars to Newman or Mrs. Alexander. Whatever should remain after making these payments was to be divided between Newman and Schoenfeld. To enable Lewis to attach the property of the firm it was necessary that he should appear to be a firm creditor, and for this purpose a further fabrication of firm notes was required.

At Mr. Naphtaly's suggestion, a demand note for seventeen thousand dollars, antedated as of December 23, 1876, was drawn up and signed by Mr. Schoenfeld in the firm name. Mr. Naphtaly, however, objected to the form of the note, as it appeared on its face to be long overdue. It was, therefore, destroyed, and a new firm note was made, antedated in like manner, but payable six months after date. A note was also made, by Mr. Naphtaly's advice, in favor of Mrs. Alexander for four thousand dollars. This, too, was antedated. These notes were given to Mr. Naphtaly with the understanding that an attachment suit should forthwith be commenced upon them—the fabricated firm note given to Bremer, and the genuine firm note for two thousand dollars held by Lewis. The note for four thou-

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sand dollars was returned on the same evening by Mr. Naphtaly, who, on reflection, preferred that the transaction should take the form of an antedated firm guarantee of Schoenfeld's original note, rather than of a newly fabricated note to Mrs. Alexander. The reason assigned for this preference was, according to Schoenfeld, that when there was a genuine note there was no need of resorting to a fabricated one. The difference either in morals or law between fabricating the entire instrument and fabricating and antedating a firm guarantee of Schoenfeld's note to Newman, he did not, when examined as a witness, attempt to explain.

All these preliminary preparations for carrying into effect the fraudulent designs of the conspirators were made with the full knowledge of the respondent. He acted as their chosen and willing instrument. That the firm was insolvent he was well aware. Mr. Schoenfeld testifies that a few days before, Lewis had suggested to him and Mr. Newman "to go ahead with the business if we thought we could run it, and he would give us the money to keep it up for a year or two longer and we could get in a large credit and then burst up."

The fraudulent designs of the parties, and the complicity of Lewis, are confessed by Mr. Naphtaly himself. He testifies that Newman, Schoenfeld, and Lewis desired this attachment suit to be brought, and to secure all the property of the firm of Schoenfeld, Cohen & Co., by means of that suit, and they all acted in concert all the time until Lewis and Schoenfeld had the fight in the office. (Naphtaly's Test. Trans. 878, 879.) Lewis "knew that he was going to make more than his claim, and he didn't want anything for outsiders." (Naphtaly's Test., Trans. 881.) By this felicitous epithet Mr. Naphtaly designates the whole body of foreign and eastern creditors, whose shipments, arrived and to arrive, it was proposed to appropriate without the payment of a single dollar of the purchase money.

The arrangement being thus completed, the eight thousand dollar firm note in Bremer's hands was obtained from him, and suit was brought in the name of Lewis for forty-

one thousand dollars, and an attachment levied on the stock in trade, on debts and accounts of the firm. No scruple or hesitation seems to have been felt by any of the parties or their attorney in making the allegations under oath necessary to institute these proceedings. The seizure by the sheriff of the stock in trade of the firm rendered it impracticable any longer to preserve the secrecy which, up to that time, had been carefully guarded. The banks and the agents for foreign creditors became alarmed and pressing in their demands that the suit should be defended. The chief danger which threatened the success of the plot was the institution of bankruptcy proceedings before a levy under judgment and execution could be made.

It was therefore thought that some show or pretense of defending the suit should be made. The attorney selected by Mr. Naphtaly for this purpose was Mr. W. H. Sharp. It does not appear that at this time Mr. Sharp was informed that the notes on which the suit was brought had been fabricated, and that, with the exception of the two thousand dollar note to Lewis, they represented no real indebtedness of the firm. But he did know, or rather he supposed, that a fraud on the bankruptcy act was intended; that the suit was to be an "amicable" one; that no defense was to be made and no obstacle interposed to prevent the plaintiff from obtaining the preference over all the creditors of the firm which the suit was instituted to secure.

The foreign creditors of the firm were represented by Mr. Shainwald. He was very anxious that the suit should be defended, and was distrustful of Schoenfeld's assurances that a defense was intended. This was communicated to Mr. Sharp, who replied: "I know Shainwald; I will speak to him; bring him to me." Mr. Shainwald was soon after brought to Mr. Sharp's office, and told by the latter that the suit would be defended. On this point Mr. Sharp's testimony is as follows:

"Q. Then you said 'bring him to me?' A. Yes, sir.

"Q. Then you told Mr. Shainwald that the suit would be defended? A. That I was employed, and would defend the suit.

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“Q. How could you make such a statement if you were not so employed? A. The day before that it was understood that I should put in that demurrer—make that defense.

“Q. A frivolous demurrer for delay? A. Yes, sir, that is so; I don't know that I used the word defend; I may have said so.

“Q. What made you tell him so if you were not employed to make any defense, and it was with the understanding, and to your knowledge, an amicable suit, and you were not to obstruct the plaintiff in getting the judgment at the earliest day, in order to defeat the bankrupt act? A. The object was to assure Mr. Shainwald that the approaching default would not be allowed to be entered that he was so much concerned about.

“Q. Was that a falsehood? A. I was not under any obligation to him, I thought.” (Sharp's Test., Trans. 987.)

With regard to this interview, Mr. Schoenfeld testifies that Mr. Sharp told Shainwald that “it would be quite a while before the suit would come up, and that he could fight it for a long time; and that Shainwald left the office satisfied that he would have ten days, and that he would have enough claims from the east within that time to put the firm into bankruptcy. It was understood privately, however, between Newman and Sharp and myself, that instead of the usual ten days allowed on overruling a demurrer, Sharp should take only three days. Naphtaly told me he had fixed things with Sharp when he employed him. Mr. Naphtaly employed Sharp for defendants in the Lewis suit, and told me he had an understanding to take judgment in three days after the overruling of the demurrer.” (Schoenfeld's Test., Trans. 613, 614). The judgment was taken accordingly.

Mr. Sharp's assurances do not seem to have allayed Mr. Shainwald's apprehensions. He still continued importunate in his demand on Mr. Schoenfeld that he should at once go into voluntary bankruptcy. He had discovered that there were only three days in which to answer. Unable to find any pretext for evading Shainwald's importu-

nities, Schoenfeld applied for advice to Mr. Naphtaly. Schoenfeld testifies that he was told by Mr. Naphtaly to "tell him (Shainwald) that Mr. Sharp had neglected to put in the answer; that it was an oversight of his which he discovered, and came to me not to take advantage of it. For God's sake do not let him get any papers in the United States district court before ten o'clock in the morning." (Trans. 617.) Similar representations with regard to the intended defense of the suit were made to Mr. Belknap, an attorney employed by the banks. Mr. Naphtaly himself admits that he really intended to deceive Mr. Belknap in regard to the matter, and make him believe that Mr. Sharp was employed to defend the suit. (Trans. 913.) The bank, however, was assured that it should receive a *pro rata* share of whatever sum the goods might bring at the sale on execution.

I have entered somewhat minutely into these repulsive details of falsehood and deception because they were necessary to show beyond dispute or cavil the fraudulent and collusive character of the suit and the sham defense that was made to it. It is perhaps hardly necessary to add that Mr. Sharp, the attorney for defendants, sent his bill to and was paid by Lewis, the plaintiff. The arrangements made with the banks for a *pro rata* share of the proceeds of the sale on execution, made it necessary for the interests of the conspirators that Lewis should bid them in for the lowest possible price. No effort was spared to accomplish this object. Only the indispensable advertisements were published, and but little opportunity was afforded to the public to ascertain the value and quality of the goods. But a private inventory with the cost prices attached was made out, and given exclusively to Mr. Lewis. Efforts were made to discourage other parties from bidding, and the contents of the store were sold by the floor, and not in lots, as would have been most advantageous. Mr. Lewis succeeded in becoming the purchaser for a sum insignificant in comparison with the market value of the goods.

It is unnecessary to recount in detail the remaining steps taken to consummate the fraudulent designs of the parties.

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Enough to say that by various methods Lewis succeeded in obtaining possession of almost the entire assets of the firm, including the bills of lading for the goods purchased abroad by Schoenfeld. Nothing has ever been paid to any of these creditors. Several months having elapsed, Mr. Schoenfeld became impatient for the payment to Mr. Bremer of the eight thousand dollars promised as his share of the plunder. To this Lewis demurred. A quarrel ensued, and Schoenfeld disclosed the whole affair to Mr. Cohen, who seems to have been up to that time ignorant of its real nature. Legal advice was at once taken, and Mr. Crittenden, solicitor for complainant in the present suit, on behalf of Cohen requested of Mr. Sharp to consent to his substitution as attorney for Cohen, or that Sharp should unite with him in a motion to set aside the judgment. Mr. Sharp declined both propositions, although he was advised by Mr. Crittenden of the nature and origin of the fabricated notes upon which judgment had been recovered, and was informed that Cohen had never been served with process in the suit, and had been kept in ignorance of the proceedings. Mr. Crittenden thereupon determined to move in the nineteenth district court that he be substituted as attorney for Cohen, and that the judgment be set aside. The motion was accordingly made on affidavits alleging in substance what has been proved in this cause, and narrated in this opinion. The motion was opposed by Mr. Naphtaly, assisted by Mr. Sharp, who furnished him with an affidavit and gave him all the co-operation in his power that the judgment should stand.

Mr. Sharp states that his reason, or one of his reasons for this, was that the rights of other persons were concerned. When asked to whom he referred, he replied that he referred to Mr. Lewis.

The motion to set aside the judgment was denied by the court. The motion to substitute has never been decided.

On the twenty-sixth day of April, 1878, a voluntary petition in bankruptcy was filed by Cohen and Schoenfeld, under which the firm was adjudicated bankrupt. Mr. Shainwald was subsequently appointed assignee and the present suit commenced. No comment is necessary upon the facts re-

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lated in the foregoing narrative. They exhibit as flagrant a case of gross and deliberate fraud upon creditors as can well be imagined. The fraud derives an additional heinousness from the fact that a court of justice was made the instrument of its perpetration by its own officers, whose highest professional duty was to demean themselves uprightly before it, and to scrupulously abstain from all attempts to deceive or impose upon it. The court was not only induced by falsehood and deceit to render judgment for the plaintiff in a collusive suit, brought on fictitious demands, but it was prevented from correcting its error by the strenuous opposition of both the attorneys, supported by their own affidavits.

If practices like these are suffered to pass without exposure and rebuke, the legal profession will rapidly decline in public esteem, the authority of the courts will be weakened, and even respect for the law itself, without which free institutions are impossible, will be gradually but surely destroyed. The frauds perpetrated in this case are, therefore, more than a private wrong. They rise to the bad eminence of a public crime. In fixing the amount of the decree I have sought to ascertain the value of the firm's assets which came into the possession of the respondent. The nature of the inquiry forbade the hope of any very accurate result. I have indicated in a memorandum filed with the decree the various items of which the aggregate sum decreed is composed. To enumerate them here and to give in detail the testimony in regard to them, would greatly increase the length of this opinion, already longer than I could have wished.

It will perhaps not be thought unreasonably long when it is considered that the testimony in the case covers more than twenty-two hundred written pages. Besides, *non sunt longa quibus nihil est quod demere possis*.

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Points decided.

RECLAMATION DIST. No. 108 v. GEORGE HAGAR.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

NOVEMBER 8, 1880.

1. **DUE PROCESS OF LAW.**—Whenever, by the laws of the state, a tax or assessment is imposed upon property for public uses, whether for the whole state, or a limited portion of it, and those laws provide a mode of contesting the charge thus imposed by suit in the ordinary courts of the state, with notice to the person, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law.
2. **SAME.**—The statute of California authorizing the reclamation of swamp lands, and the assessment of the expenses upon the lands benefited, and collection thereof by a civil suit in the ordinary courts of the state to enforce the lien against the land, does not violate that provision of the national constitution providing that no state shall “deprive any person of * * * property without due process of law.”
3. **UNEQUAL ASSESSMENTS NOT NECESSARILY VOID.**—The reclamation statute of California seems to require the assessment to be made proportionate to the benefits which will result from the work; but if not strictly so made, it violates no provision of the constitution of the United States, or of the state of California.
4. **STATE STATUTES—AUTHORITATIVE CONSTRUCTION.**—The construction by the highest court of a state of a state constitution, or statute, which does not trench upon any of the powers of the national government, or upon any right protected by the constitution of the United States, is authoritative and conclusive in the national courts.
5. **IMPAIRING OBLIGATION OF CONTRACT.**—The statute of California providing for the reclamation of swamp lands impairs no contracts between the United States and the state of California, nor of the state of California and purchasers of swamp lands, nor any contracts of owners of lands held under Mexican grants, or other patents from the United States, nor of any contract found in the charter or by-laws of Reclamation District No. 108.
6. **COIN ASSESSMENT—OBLIGATION OF CONTRACT.**—Authorizing the assessment to be collected in coin, where the indebtedness of the reclamation district for reclaiming the land might be paid in other lawful money, does not impair the obligation of a contract.
7. **STATUTE OF LIMITATIONS.**—The owner of the land is not in a position to set up, as a defense to an action to recover the assessment, the fact that a portion of the indebtedness of the reclamation district for reclaiming the land, payable out of the assessment when collected, is barred by the statute of limitations.
8. **COUNSEL FEES A PROPER CHARGE.**—Counsel may be employed, in the sound discretion of the officers of the reclamation district, to aid the district attorney of the county in prosecuting actions to collect the assessments, notwithstanding the fact that the statute makes it the duty of the district attorney to prosecute such actions; and the reasonable

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fees of counsel so employed are properly a part of the "incidental expenses" which the statute authorizes to be paid out of the fund raised by the assessment.

9. RECLAMATION AT EXPENSE OF LAND.—Under the constitution of California the legislature has power to authorize the formation of reclamation districts for the reclamation of swamp lands at the expense of the lands reclaimed and benefited.
10. SAME.—The legislature also has power to include in such reclamation districts to be so reclaimed, swamp lands held under Mexican grants, as well as those the titles to which are derived through the state under the act of congress granting to Arkansas and other states the swamp lands situated within their limits.
11. THE POWER TO RECLAIM SWAMP LANDS is not derived from the Arkansas act; and there is no contract in that act, express or implied, on the part of the state, that it will not reclaim other swamp lands, or that it will limit the expense of reclaiming the swamp lands of the state to the proceeds of the sales of the lands derived under that act.
12. THE SWAMP LANDS HELD UNDER MEXICAN GRANTS, as well as those derived under the Arkansas act, are included in the provisions of the act of 1868, and of the political code authorizing the reclamation of swamp lands.

Before SAWYER, Circuit Judge.

A. C. Adams, F. E. Baker, and W. B. Treadwell, for the plaintiff.

W. C. Belcher and I. S. Belcher, for the defendant.

SAWYER, Circuit Judge. The first point made against the validity of these proceedings, and elaborately argued, is disposed of by the supreme court of the United States in *Davidson v. New Orleans*, 96 U. S. 97, in which it is held that "whenever by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for public uses, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * It is not possible to hold that a party has, without due

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process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." With reference to that case the court further observes: "Before the assessment could be collected or become effectual, the statute required that the tableau of assessments should be filed in the proper district court of the state; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and an advertisement made as to those who were unknown or could not be found. This was complied with; and the party complaining then appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the supreme court. If this be not due process of law, then the words can have no definite meaning as used in the constitution." (Id. 105.)

So in this case, no property can be taken from the party except upon a judgment, after a full hearing in a suit to recover the amount of the assessment, in which the legality of all the proceedings is contested and adjudged. That is the very purpose of the present suit, and we are now engaged in ascertaining the validity or non-validity of the assessment in the regular course of due process of law. The assessment does not take the property; it is only taken in pursuance of the judgment after a full hearing. The case cited is conclusive on the point.

The second point relied on by the defense, is, that the assessment was made, and the law authorized it to be made, without regard to any known or just principle of apportionment, or equality of burden or apportionment. I do not understand it to be claimed that it was not made in accordance with the statutory provisions in section 33 and other sections; but it is claimed that the statute itself is unconstitutional and void on the grounds indicated. I am not prepared to say that the statute does not require the assessment to be so made as to have some just relations to the benefits resulting from the improvement. The provision is that the commissioners "shall jointly view and assess, upon

each and every acre to be reclaimed or benefited thereby, a tax proportionate to the whole expense, and to the benefit which will result from such works." (Section 33.) This certainly seems to require an apportionment according to benefits. But suppose it does not require the apportionment to be strictly in all particulars in accordance with the benefits, then this point presents a question of constitutional law arising under the state constitution; and the decisions of the supreme court of the state upon such questions are conclusive upon this court when they do not trench upon any of the rights protected by the constitution of the United States. (*Hawes v. Contra Costa Water Company*, 5 Saw. 287; *Walker v. State Harbor Commissioners*, 17 Wall. 650; *Bailey v. Magwire*, 22 Id. 230; *South Ottawa v. Perkins*, 94 U. S. 260; *State Railroad Tax cases*, 92 Id. 576; *Fairfield v. Gallatin Co.*, 100 Id. 47.) In *Davidson v. New Orleans*, the supreme court says: "It is said that plaintiff's property had been previously assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the federal constitution which forbids this, or which forbids unequal taxation by the states." (96 Id. 106.) The question, then, rests upon the state constitution as construed by the highest court of the state, and those decisions are against the defendant. This very point seems to me to be determined in *Hagar v. Supervisors of Yolo County* (arising under this same act), 47 Cal. 234, 235; *Burnett v. Mayor of Sacramento*, 12 Id. 76; *Emery v. San Francisco Gas Company*, 28 Id. 345; and subsequent cases affirming it settle this question in this state.

The next point relates to impairing the obligation of a contract. I am unable to find any contract, either between the United States and California, or the United States and her patentees or grantees, or between the state of California and purchasers from her, or grantees of the United States, the obligation of which is impaired by the law authorizing the assessment in question. Nor do I think there is any contract found in the charter of the reclamation district, the obligation of which could be impaired, within

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the meaning of the constitution, by reason of the fact that the assessment was levied in violation of the provisions of section 7 of the by-laws, which provides that "the trustees shall allow no indebtedness to accrue in excess of the amount of assessment levied." A similar question seems to have been raised in *Davidson v. New Orleans*, and overruled by the state court, which ruling was sustained by the supreme court of the United States. Says the latter court: "If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the supreme court of Louisiana in being unable to discover such a contract." (96 U. S. 106.)

In case the first assessment proves insufficient to pay the expenses of a reclamation once inaugurated, the statute itself authorizes a second assessment to be made to make up the deficiency; and the supreme court, in one of the cases arising under this act already cited, holds such second assessment under the act to be valid, notwithstanding the provision in the by-laws now under consideration.

In my judgment, authorizing the assessments to be collected in gold coin did not impair the obligation of any contract. The states are authorized to require taxes and assessments to be collected in coin, if deemed expedient. (*Lane County v. Oregon*, 7 Wall. 73.) Gold coin is lawful money of the country, and is legal tender in payment of debts. The statute itself makes no distinction between it and other lawful money also made a legal tender.

I need not inquire whether Reclamation District No. 108 could successfully set up the statute of limitations to any portion of its indebtedness. The defendant is not in a position to raise the question as a defense to this action. The statute might run against its patient creditors, while the reclamation district is earnestly and vigorously pressing its suits to collect the assessments in order to enable it to pay its debts.

The expenses of collecting the assessments, among which are proper attorney and counsel fees in prosecuting suits for their recovery, are, in my judgment, proper "incidental ex-

penses," within the meaning of the statute, to be paid out of the funds raised; and the fact that the statute makes it the duty of district attorneys to prosecute such actions does not prevent the employment of other counsel, in the sound discretion of the officers of the district, in proper cases to aid in the litigation. (*Smith v. Sacramento*, 13 Cal. 532; *Hornblower v. Duden*, 35 Id. 668, 669.) This identical point is said in complainant's brief, and not denied by defendant, to have been decided by the supreme court of California, December 29, 1879, in three cases—*Reclamation District No. 108 v. Hickock*, *Same v. Howell*, and *Same v. Howell et al.* If so, the determination is authoritative.

The supreme court of California have settled the question that, under the constitution of California, the legislature has power to authorize the formation of districts for the reclamation of swamp lands within the state, at the expense of the lands so reclaimed. (*Hagar v. Supervisors Yolo County*, 47 Cal. 223; *People v. Hagar*, 52 Id. 171; *People v. Reclamation District No. 108*, 53 Id. 348; *Dean v. Davis*, 51 Id. 407.) This being established, I have no doubt of its authority to include swamp lands which are held under Spanish grants, or under any other patent from the United States, as well as those the titles to which are derived through the state under the Arkansas act granting the swamp lands to the several states in which they are situated.

The power to reclaim at the expense of the lands no more depends upon the source from, or channel through, which the title came, than the power to authorize the improvement of the streets of a city at the expense of the adjoining property. There is no contract that lands patented by the United States upon grants to purchasers, or held under Mexican grants and protected by the treaty, shall be exempt from the burdens imposed upon other property under the police or the taxing powers of the state. The state does not derive its power to reclaim swamp lands from the Arkansas act; nor does it contract by that act not to reclaim other swamp lands, or to limit the expense of reclaiming to the proceeds of sales of those particular lands. Its power to reclaim is wholly independent of the provisions of that act. By ac-

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cepting the grant it may have imposed upon itself the duty to reclaim the lands granted, but it thereby in no way limited its power derived from other sources to reclaim those, or any other lands. The several swamp land cases already cited, arising under the act in question, also decide that the legislature has power to include lands held under Mexican grants in reclamation districts.

The point, that conceding the power of the legislature to include the lands of Hagar, held by him under a Mexican grant, in a district formed for the purpose of reclamation, still it did not in fact so include them by the act of 1868, or the provisions of the political code in question, is distinctly decided against the defendant by the supreme court of the state in *Hagar v. Supervisors Yolo County*, 47 Cal. 223; *People v. Hagar*, 52 Id. 172. This being a construction of a statute of California by the highest court of the state is conclusive upon this court.

The last point, that the assessment is void because not made according to any rule of benefits, etc., has already been considered under another head, and it is disposed of by the authorities already cited. (See particularly *Hagar v. Supervisors Yolo County*, 47 Cal. 233, 234; *People v. Hagar*, 52 Id. 183; *Davidson v. New Orleans*, 96 U. S. 97.)

No other point appears to me to require special notice. All other questions presented in this case upon which there ever could have been grounds for reasonable doubt are, in my judgment, authoritatively settled either by decisions of the United States supreme court or the supreme court of the state of California.

There must be a decree for complainant, in pursuance of the prayer of the bill, and it is so ordered.

Similar decree in the three other cases.

COOS BAY WAGON ROAD CO. v. CHARLES CROCKER.

CIRCUIT COURT, DISTRICT OF OREGON.

NOVEMBER 22, 1880.

1. **VENDOR'S LIEN.**—Upon the sale of real property, on credit, without collateral security, the vendor has a lien upon the same for the unpaid purchase money, unless it was waived by the express agreement of the parties; and such lien exists and may be enforced against all persons claiming under the vendee with notice that the purchase money is unpaid.
2. **ASSIGNMENT.**—The assignment and acceptance of a contract for the sale of real property does not make the assignee personally liable for the purchase money due thereon; and as against him the vendor's remedy is confined to the enforcement of his lien on the property.
3. **CONTRACT—ENTIRE OR SEVERABLE.**—Whether a contract is entire or severable depends upon the intention of the parties, to be gathered from the circumstances of the case.
4. **SAME.**—A contract to sell ninety-six thousand acres of wild land, of different grades and values, lying substantially in a body, at an average price of one dollar per acre, to be conveyed and paid for as and when the same is surveyed and patented to the grantees by the United States, is not as many distinct contracts as there may be conveyances and payments in pursuance thereof, but only one entire contract, and therefore the vendor's lien for any portion of the purchase money thereof remaining unpaid extends to and may be enforced against the whole tract.

Before DEADY, District Judge.

*Rufus Mallory and W. R. Willis, for the plaintiff.**William Strong, for the defendant.*

DEADY, J. On March 3, 1869, congress passed an act granting "to the state of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos bay to Roseburg in said state," the alternate sections of the public land, not exceeding six sections in width on each side of said road (15 Stat. 340); and on October 22, 1870, the legislative assembly of Oregon passed an act granting the Coos Bay Wagon Road Company "all lands, rights of way," etc., so granted to the state, "for the purpose of aiding said company in constructing the road mentioned in said act of congress, and upon the conditions and limitations therein prescribed." (Ses. L. 40.)

On January 1, 1875, the plaintiff was duly incorporated

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under the laws of Oregon, and on May 31, of the same year, had constructed said road and thereby become entitled under said grant to ninety-five thousand three hundred and forty-five and twelve hundredths acres of said public lands, and had received a patent from the United States for thirty-five thousand five hundred and fifty-three and fifty-nine hundredths acres thereof, and was entitled to a patent for the remaining sixty thousand seven hundred and ninety-one and fifty-three hundredths acres as soon as it was surveyed.

On the same date an agreement was made between the plaintiff, sundry persons who were the stockholders of said corporation, and John Miller, for the sale and assignment to the latter of all the stock thereof, and the sale and conveyance of the land and road aforesaid, whether patented or unpatented, less seven thousand nine hundred and thirty-nine and ninety-four hundredths acres theretofore sold to settlers thereon, for the consideration of one dollar per acre, to be paid, as and when, the same was duly assigned and conveyed as therein provided, and on the same day said stockholders duly transferred the stock of said corporation to T. B. Benchley, in trust for said Miller, as by said agreement was provided, and the plaintiff duly delivered to him the possession of said road and conveyed to him the lands for which it had then received a patent, less six thousand five hundred and thirty-nine and ninety-four hundredths acres thereof already sold to settlers thereon, and received therefor from said Miller one dollar per acre, or in the aggregate twenty-nine thousand and thirteen dollars and sixty-three cents.

Before the patents were received for the remainder of the lands Miller became insolvent, and was largely indebted to the defendant and Leland Stanford, C. P. Huntington, and Mark Hopkins for money received of them and not accounted for. On account of this indebtedness, Miller, on June 21, 1875, conveyed the lands theretofore conveyed to him by the plaintiff to the defendant and his associates aforesaid, and on August 18, of the same year, jointly with his wife, and in his true name, A. R. Woodroof, again con-

veyed the same premises to said defendant and associates, and in like manner and for the same purpose conveyed to the same parties the said road; and on July 1, 1875, duly assigned said agreement of May 31, 1875, for the sale and purchase of said corporation lands to the defendant.

In the spring of 1876 the plaintiff caused a letter to be written and sent to the defendant, stating the fact that certain occupants of portions of the then unpatented lands bargained and sold to Miller as aforesaid, were willing to relinquish their rights as pre-emptors under the laws of the United States, and purchase from the grantee thereof, and asking for instructions in the premises. The defendant replied, under date of April 5, 1876, "for self and associates," Stanford, Huntington, and Hopkins aforesaid, who together constituted "the Western Development Company," stating that "the owners of the land grant of said company do not desire to have any contest with any *bona fide* settler, who settled upon the land which was granted to said company before the passage of the act of congress and was entitled to pre-emption thereon," and authorized the plaintiff to convey to such settlers the lands occupied by them upon the payment of one dollar and twenty-five cents per acre, the one dollar to go to the plaintiff and the twenty-five cents to the defendant and his associates, and also authorizing the plaintiff "to make contracts with such settlers upon all unpatented land, and carry them into effect by deed prior to deeds to be made under our contract to purchase, or we will make deeds when deeded to us, not to exceed one thousand acres. The proof of such settlement to be sent to me before the adjustment is made." In pursuance of this instruction the plaintiff sold and conveyed two hundred and forty acres of the unpatented lands to settlers thereon for one dollar and twenty-five cents per acre, and on October 14, 1876, paid sixty dollars of the proceeds to the Western Development Company, and retained two hundred and forty dollars thereof for itself.

At the date of the conveyances and assignment aforesaid, made by Miller prior to August, 1875, he was held in confinement by the defendant and his associates aforesaid upon

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the charge of embezzlement while in their employ. Afterwards it was ascertained that Miller's real name was Woodroof, and that he had a wife in Virginia, whereupon the deeds aforesaid to the premises, dated in August, were executed by him jointly with his wife in his true name.

On January 19, 1877, the defendant reassigned said agreement of May 31, 1875, for the sale and purchase of said land grant to said John Miller, and agreed in writing to sell and convey to him all of said lands theretofore conveyed by said Miller to him or his associates upon Miller's paying therefor the sum of one dollar and twenty-five cents per acre and expenses incurred thereabout, together with interest upon the purchase money, within ninety days, after which the option of Miller was to cease and determine.

This assignment and option, although nominally made to Miller, was intended for the benefit of A. T. Green and H. S. Brown as well, and was in fact an arrangement by which they three were authorized to dispose of this land grant at a profit to themselves, if they could, within ninety days; failing in which, the option and assignment were to become null and void.

By November 8, 1876, the remaining portion of the grant was surveyed and patented to plaintiff; and on May 5, 1877, it executed a deed in due form of law therefor to the defendant, and duly tendered the same to him on July 27, 1877, and demanded payment therefor, which was refused on the ground that he had reassigned the contract to Miller. The portion of the grant conveyed to Miller, and by him conveyed to the defendant, is of much more value, probably fifty per cent. more, than the remainder of it.

During all the time of these transactions the defendant and his associates aforesaid, were citizens of California, and not resident in Oregon, and were never in the possession or control of the premises, otherwise than according to the foregoing statement of facts and their legal operation and effect.

Under these circumstances the plaintiff commenced this suit in the circuit court for the county of Coos to recover from the defendant the sum of sixty thousand seven hundred

and ninety-one dollars and fifty-three cents, alleged to be due on the contract of May 31, 1875, and to establish and enforce a vendor's lien upon the whole premises for said sum and the costs of suit, which was afterwards removed by the defendant into this court. It is alleged in the amended bill that the defendant, by reason of the premises, undertook and promised to keep and perform all the covenants in the agreement of March 31, 1875, to be performed by Miller; and upon the hearing, evidence was given tending to prove that the defendant, at and immediately before the conveyance and assignment to him by Miller, and in consideration thereof, expressly undertook and promised to do so; but, in my judgment, it is not sufficient to establish that fact; but the evidence satisfactorily proves that the defendant, either in person, or by his agents and attorneys, at and before such conveyance and assignment had full notice of the contract of May 31, 1875, between Miller and the plaintiff and the respective obligations and liabilities of the parties thereto.

Having concluded, that, as a matter of fact, the defendant did not undertake to perform Miller's contract with the plaintiff, it is unnecessary to consider whether such an undertaking is required by the statute of frauds to be in writing as set up in the defendant's answer. But the plaintiff claims that the defendant is estopped to deny that he did so undertake and promise on account of his letter of April 5, 1876, to the plaintiff, by which it appears he assumed to be the assignee of Miller as to this land grant, whether patented or unpatented, and particularly the latter.

But there are no elements of an estoppel in this transaction. The plaintiff was neither deceived nor injured by what the defendant said or did in this respect; nor was it thereby or otherwise induced to take any action upon or change its relations to the subject-matter, and without these circumstances there can be no estoppel. (*Wythe v. Smith*, 4 Saw. 24; *Wythe v. Sulem*, Id. 88.)

But the transaction of which this letter is the principal item is very satisfactory proof that the defendant had become the assignee of Miller and accepted his assignment of

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the contract with the plaintiff for the sale and purchase of this land grant. His declarations in this connection are utterly inconsistent with any other theory than that he so regarded himself; and certainly his conduct amounts to a direct assertion to that effect. In this letter to the plaintiff the defendant assumes to be entitled to the control of the land—patented and unpatented—and directs the terms of settlement to be made with the occupants upon the unpatented portion—not exceeding one thousand acres thereof—and requires the proof of the facts “to be sent to me (him) before the adjustment is made.” He also directed that the proceeds of the sale should be first applied to the payment of the plaintiff, as provided in the contract of sale, and that the remainder should be paid to himself and associates, which was done without, so far as appears, any comment or dissent on his part.

It is admitted, that on July 1, 1875, Miller assigned the contract of sale and purchase to the defendant, but it is claimed that the assignment was made without the defendant's knowledge or acceptance, and therefore he is not affected by it. But from these facts the only reasonable conclusion is that the defendant was well aware of the assignment, and knowingly asserted his rights under it—that he was assignee of Miller in fact as well as form.

Upon this state of facts the plaintiff claims a vendor's lien as against the defendant upon the whole premises for the unpaid purchase money. It is admitted by the defendant that the plaintiff has such a lien so far as the lands unconveyed by Miller are concerned, but he denies that it extends to the lands conveyed to Miller and by the latter to himself and associates. This denial is based upon two grounds: 1. That it was not the intention of the parties to the contract that any such lien should be reserved as against said lands; and, 2. That the contract of sale was not an entirety, but separable into two distinct parts or contracts, to wit, a contract to sell the lands conveyed to Miller, and also a contract to sell the unpatented land, the same to be conveyed and paid for when and as fast as the same was surveyed and patented to the plaintiff.

Upon the sale of real property, on credit, without collateral security, equity raises a lien thereon in favor of the vendor, as a security for the unpaid purchase money; and this lien exists whether the property is conveyed to the purchaser or not. The vendee is considered the trustee of the vendor in respect to the purchase money until it is paid. And this lien continues and holds good against all subsequent purchasers with notice that the purchase money is unpaid. (*Mackreth v. Symmons*, 15 Ves. 329; *Bayley v. Greanleaf*, 7 Wheat. 49; *Chilton v. Braiden's Adm'x*, 2 Black, 460; *Lewis v. Hawkins*, 23 Wall. 125; *Gilman v. Brown*, 1 Mass. 212; *Pease v. Kelly*, 3 Or. 417; *Baum v. Grigsby*, 21 Cal. 175; *Garson v. Green*, 1 Johns. Ch. 308; *Champion v. Brown*, 6 Id. 402; 1 Wash., R. P. 502-504; *Adam Eq.* 126-129; *Story Eq. Jur.*, sec. 1217 *et seq.*; 4 Kent, 151-154.)

As to the intention of the parties concerning this lien, it is to be considered that the lien is a natural equity, and arises and exists independently of their agreement. Neither is it waived nor relinquished, unless by an express agreement to that effect, or conduct plainly inconsistent with an intention to retain it, as by taking a mortgage on the premises or a distinct and independent security for the purchase money; and the burden of proof is upon the purchaser, to show that the lien has been waived or relinquished. (*Mackreth v. Symmons*, 1 Lead. Cas. Eq., 326, n.; *Mackreth v. Symmons*, *supra*, 364; *Gilman v. Brown*, *supra*, 213; 4 Kent, 152.)

In this case no security of any kind was taken for the payment of the unpaid purchase money; nor is there anything in the circumstances of the case to even suggest that there was any understanding or agreement between the parties to the sale, to waive the vendor's lien. It is not enough to say that the thought of the lien, as a security for the payment of the purchase money, was not in the minds of the parties at the time of sale. For, it is in just such cases that equity, as a means of doing justice between the vendor and vendee or the assignees of the latter, with notice, creates and enforces this lien. And, therefore, whenever the vendee or assignee seeks to hold property free from this

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lien, he must show that it was intentionally relinquished by the vendor.

As to whether the contract of sale was an entirety or not, the contention of the defendant is that the sale of the unpatented lands was made by a distinct and separate contract from that of the patented ones, and therefore there can be no lien upon the latter for the purchase money due on the sale of the former. If the premise is correct the conclusion follows of course.

In 2 Parsons on Cont. 517, it is said, that "any contract may consist of many parts; and these may be considered as parts of one whole, or as so many distinct contracts, entered into at one time, and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which the question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed or is left to be implied by law, such a contract will generally be held to be severable. * * * But the mere fact that the subject of the contract is sold by weight or measure, and the value is ascertained by the price affixed to each pound or yard or bushel of the quantity contracted for, will not be sufficient to render the contract severable."

In *Miner v. Bradley*, 22 Pick. 457, it was held that a sale at auction of a cow and lot of hay, at one bid for seventeen dollars, was an entire contract, the court saying that "as the cow and the hay were bought together for one gross sum, there are no means of ascertaining how much was intended for the one and how much for the other."

In *Johnson v. Johnson*, 3 Bos. & Pul. 162, the plaintiff purchased two separate parcels of real property, the one for three hundred pounds and the other for seven hundred pounds, each being distinctly valued, and took one conveyance of both. The title to one of the parcels proving

invalid, he brought an action to recover the consideration thereof, and prevailed; the court, per Lord Alvanley, saying: "If the question were, how far the part of which the title has failed formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered to say he would retain all of which the title was good, and recover a proportionable part of the purchase money for the rest. Possibly the part which he retains might not have been sold unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. * * * In this case, however, no such question arises; for it appears to me, although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for three hundred pounds and the other for seven hundred pounds."

In *Clark v. Baker*, 5 Met. 452, a contract to sell a cargo of yellow and white corn—the quantity being unknown—on board the schooner of the seller, at a certain price per bushel for the yellow and another for the white corn, was held to be an entire one, for the cargo, and not any number of contracts for each kind of corn or separate bushel. In the course of the opinion the court says: "If the contract is entire, if it is one bargain, then it matters not whether there is one or many articles, and though each may have an appropriate price."

In *Davis v. Maxwell*, 12 Met. 286, it was held that a contract to work "for seven months at twelve dollars per month" was an entire one, and not seven separate contracts to work seven distinct months for seven distinct twelve dollars. The court said: "It is one bargain; performance on one part and payment on the other; and not part performance and full payment for the part performed."

According to these authorities, as well as the nature of the case, this transaction was a single and entire contract for the sale of this land as a whole. Indeed, it is difficult to conceive of it in any other light. Briefly stated, a land

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grant consisting of alternate sections within six miles on either side of a road, about fifty miles long and running from tide water on Coos bay across the Coast range to Roseburg, and containing about ninety-six thousand acres of wild land, varying in value per acre from nothing indefinitely upwards, was sold in a body for one dollar per acre, by a single written agreement. By the terms of this agreement the land was to be conveyed to the vendee as fast as it was surveyed and patented, and the portion already patented as soon as he could examine the patent and was satisfied with the title, the payments to be made as the conveyances were.

There is nothing in the situation or condition of the subject-matter or the parties that in any way indicates that this contract was not single and entire. It was one bargain, and the land, although valued by the acre and not absolutely contiguous legal subdivisions, was practically one body—the land grant of the Coos Bay Wagon Road Company. Neither is it to be supposed that the plaintiff would sell the patented part of the grant, which, the proof shows and the court almost judicially knows, was worth much more than the remaining portion, separately, for the same price per acre as the other.

Most certainly the price was an average one for the whole grant, and the sale an entirety. And, as was said in *Johnson v. Johnson, supra*, in the consideration of a similar question, “the grossest injustice would ensue” if the defendant was suffered to retain the better part free from the vendor’s lien for the price of the poorer part upon the arbitrary assumption that the sale was made by two separate contracts. Nothing, incapable of mathematical demonstration, is more certain than that the parties to this transaction never contemplated that this otherwise single and entire contract of sale was resolved into a number of distinct and separate ones, simply because it was therein provided that the conveyance should be made from time to time as fast as the land was surveyed and patented.

The agreement on the part of the stockholders of the road to transfer the stock to Benchley, as trustee for Miller, to

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be held by him as such trustee until the final payment was made on the land, was duly performed; but this was not intended as a security for the payment of the purchase money, but rather a security or provision for the custody of the stock during the pendency of the transaction and its delivery upon the final completion thereof.

But this stock, and the road which it represents, are not shown to have any appreciable value; and from this, and the very nature of the case, the reasonable inference is that its value at most is merely nominal. The formation of the company and the construction of the road were the means or device by which the land grant was obtained from the state, and thereafter, I apprehend, neither was of any benefit to any one, save the public. Evidently, the stock was a mere nominal and formal part of the transaction, and did not in any appreciable degree affect the amount of the consideration therefor.

Nor should it be forgotten that the justice of this case, as well as the law, is with the plaintiff. The defendant obtained his conveyance and assignment from Miller without advancing anything therefor, the consideration being merely a pre-existing debt, and that of no probable value. And although he is not personally liable on Miller's contract, yet, having accepted a conveyance and assignment from him of the subject-matter thereof, with notice of the fact that a portion of the purchase money was unpaid, whereby he became the legal owner of an undivided one fourth of one portion of the property, and the equitable owner of the whole of the remainder, he is justly liable for such purchase money to the extent of such ownership.

By virtue of its lien upon the premises, the plaintiff is entitled to call upon the defendant, as the assignee of Miller, to pay the remainder of the purchase money, according to the terms of the contract, or submit to have his interest in the premises sold and the proceeds applied to the satisfaction thereof. (*Champion v. Brown, supra.*)

A decree will be entered for the plaintiff accordingly.

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HERMAN SHAINWALD, ASSIGNEE, v. HARRIS LEWIS.

DISTRICT COURT, DISTRICT OF NEVADA.

DECEMBER 11, 1880.

1. ASSIGNEE—BANKRUPT ACT, SECTION 739, R. S.—While an assignee who has been appointed by a court of bankruptcy of another district may sue in this court to recover assets from a stranger, such action must be by a plenary suit, and there is nothing in the bankrupt act which takes such a suit out of the provisions of section 739 of the R. S., although the defendant may have property in this district which is claimed to be assets; and the defendant must be an inhabitant of, or be found within this district at the time of serving the writ, to give this court jurisdiction.
2. SECTION 738, R. S., CONSTRUED.—This section does not refer to a suit like the present, in which the plaintiff seeks, through a receiver, to apply the general property of a defendant to the payment of his debts, but to suits in equity, to enforce some pre-existing lien or claim upon a specific piece of property.

Before HILLYER, District Judge.

THE facts are stated in the opinion.

James L. Crittenden, for the plaintiff.*Robert M. Clarke*, for the receiver.*Philip G. Galpin*, for the defendant.

HILLYER, J. This is a motion to vacate a former order of this court appointing Ralph L. Shainwald receiver of the property of the defendant Lewis, in the district of Nevada. The plaintiff is the assignee in bankruptcy of the firm of Shoenfeld, Cohen & Co., and of Louis S. Shoenfeld, Isaac Newman, and Simon Cohen, who have been adjudicated bankrupts by the district court of California. After his appointment as assignee the plaintiff filed a bill in equity in the district court of the United States for California, against the defendant Harris Lewis, by which he sought to have a certain judgment, obtained by Lewis against the bankrupts, set aside on the ground that the judgment was fraudulent. In that suit the plaintiff obtained a decree setting the said judgment aside, declaring the evidence

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upon which it was based fraudulent, and the defendant Lewis a trustee of all the property acquired by him under said judgment, for the benefit of the creditors of the bankrupt firm and of the assignee. He was also decreed to pay a large amount of money, nearly one hundred thousand dollars, by way of damages, interest, and costs. Upon this judgment an execution was issued to the marshal of California, and by him returned *nulla bona*.

These facts appear from the bill filed in this court, and it also appears on the face of the bill that Harris Lewis is a citizen of California as well as the plaintiff, and that he has property in Nevada which the plaintiff seeks to apply to the satisfaction of his decree obtained as aforesaid in California. It is further averred in the bill, on information and belief, that the defendant Harris Lewis is secreting his property with the view of preventing the plaintiff from levying upon it and of applying it to the satisfaction of said decree; that said Lewis is possessed and the owner of large and valuable property, real and personal, within the district of Nevada and within the jurisdiction of this court; that for the purpose of hindering, delaying, and defrauding the plaintiff, said Lewis has been, since the rendition of said decree, making and issuing his notes and other evidences of indebtedness, and has procured a suit or suits to be brought against him, and has confessed, or intends to confess, judgments against himself, all for the purpose of preventing the plaintiff from obtaining satisfaction of said judgment and decree; that in a certain other suit brought as such assignee against the defendant Lewis in the district court of the district of California, and founded upon said decree, an order was made appointing Ralph L. Shainwald, of the city and county of San Francisco, receiver of the estate of said defendant, Harris Lewis; that he duly qualified, and is now acting as such receiver. A copy of the decree of the district court of California is made part of the bill, and the prayer is for judgment that said Lewis pay the amount thereof, and for an injunction and a receiver, with the usual powers of a receiver, under a creditor's bill. Upon the filing of this bill an order for the

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appointment of a receiver was made without notice to the defendant.

A special appearance has been entered by the defendant Lewis, and a motion on behalf of certain creditors is made to vacate the order appointing the receiver, chiefly on the ground that this court has not and cannot acquire any jurisdiction of this case, the said Lewis being a resident of California, and not found in this district at the time of serving the writ of subpoena, and also that it does not appear from the bill that the plaintiff has exhausted his legal remedies in this jurisdiction. Some other grounds were mentioned, as the want of notice, the insufficiency of the averments in the bill to show a case of urgency, etc.; but the case must be decided upon the first two grounds named. The subpoena has been returned and shows a service on the defendant in California. This, together with the allegation in the bill that the defendant Lewis is a citizen of California, is enough, upon the uniform construction which the eleventh section of the judiciary act, now section 739 of the R. S., has always received, to deprive this court of jurisdiction, unless, as is most earnestly and strenuously urged, that section does not apply to a suit like the present.

It is urged that it does not apply because this is a suit in equity to enforce a lien or claim against property within the meaning of the R. S. section 738, and also because this is a matter or proceeding in bankruptcy over which this court has jurisdiction, irrespective of the residence or citizenship of the parties. In the argument upon this latter proposition great stress is laid upon the very broad and comprehensive language in which the whole subject of bankruptcies is given to the district courts in section 4972, especially upon that clause which extends the jurisdiction to the collection of all the assets of the bankrupt; and it is said since this is done there must be power somewhere in the bankruptcy courts to collect assets, *i. e.*, debts due the bankrupt's estate in those cases in which a debtor resides in one district and has property in another. The case at bar is, I take it, substantially such a case, for Lewis, while not originally a debtor of the bankrupt's, has been by the decree

against him turned into a trustee for the creditors and the assignee, and adjudged to pay a large sum as damages for their benefit.

It is said again that the district courts are auxiliaries of each other in these bankruptcy matters, and that the proceedings in California are a sufficient warrant for proceeding here against the property of the defendant Lewis, as has been done, without finding him, he being a non-resident in this district. Therefore it is further argued from these premises there must be the power here claimed that there may be no failure of justice—no failure to collect all the assets. Counsel have read much from that line of decisions which maintains the right of an assignee in bankruptcy to sue in another than the district of his appointment to recover debts or other property. They find in the language used by the courts in deciding these cases, as they think, support for their position. But when these courts say the powers of the bankruptcy courts are full and complete for all the purposes of the act, they must not be understood as meaning that the usual methods of acquiring jurisdiction need not be pursued. Assignees may find it necessary to sue in other districts for the recovery of assets. If so, the courts of those districts are open to them. (*Lathrop, Assignee, v. Drake*, 91 U. S. 516.) In this sense the courts of other districts are auxiliary, not in any sense implying power to carry out and enforce the judgments and orders of one another except upon due process in the particular district. Nowhere do I find any intimation that it is not necessary to acquire jurisdiction of persons and property by the same means employed in other cases.

In the present instance the district court of this district is open to the assignee for the collection of assets. The court has jurisdiction to hear and determine such a case, but before it will have jurisdiction of this particular defendant he must be duly subpoenaed, unless, as contended, there is something in the nature of this suit which renders it unnecessary. What is said in speaking of the general powers of the bankruptcy courts under the law to act at all, must not be confounded with and applied to their power to pro-

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ceed in this particular instance. There may be a general jurisdiction to act but no jurisdiction in this particular case, owing to a failure to serve process.

In *Chaffee v. Hayward*, 20 How. 208, it was sought to recover damages for an infringement of a patent by a suit commenced in the district of Rhode Island against an inhabitant of Connecticut, and to obtain jurisdiction of the defendant by an attachment of his property in Rhode Island. The defendant pleaded to the jurisdiction that he was not an inhabitant of, nor found in Rhode Island at the time of the pretended serving of the writ. The court, in announcing its decision, alluded to the settled construction of the eleventh section of the judiciary act, requiring a service on the person of the defendant within the district, and that no jurisdiction can be acquired by attaching property of a non-resident defendant pursuant to a state attachment law, and says: "It is insisted, however, for the plaintiffs, that these rulings were had in cases arising where the jurisdiction depended on citizenship; whereas here the suit is founded on an act of congress conferring jurisdiction on the circuit court of the United States in suits by inventors against those who infringe their letters patent, including all cases, both at law and in equity, arising under the patent law, without regard to citizenship of the parties, or the amount in controversy; and, therefore, the eleventh section of the judiciary act did not apply." But the court held that that section "applied in its terms to all civil suits; it makes no exception, nor can the courts make any." "The judicial power extends to all cases in law and equity arising under the constitution and laws of the United States, and it is pursuant to this clause of the constitution that the United States courts are vested with power to execute the laws respecting inventors and patented inventions; but where suits are to be brought is left to the general law, to wit, to the eleventh section of the judiciary act, which requires personal service of process within the district where the suit is brought, if the defendant be an inhabitant of another state."

The argument, then, which would take this case out of the operation of section 739, because jurisdiction of bankruptcy matters is conferred without regard to the citizenship or residence of the parties, is not a valid one. That was precisely the argument in the case last cited. Jurisdiction of a suit by an assignee in another district exists under the bankrupt law, but how service of process shall be made is still regulated by the former law. That the defendant Lewis has been guilty of the grossest frauds in connection with the bankrupts, towards the creditors represented by the assignee, is established by the decree of the district court of California; but under the influence of a wish and inclination to help punish those frauds, we must be careful that we do not violate principles of law essential to the maintenance of justice. The defendant Lewis has a right to insist that he be brought into court as the law provides, and not otherwise. If he succeeds in escaping with his ill-gotten gains, it will not be the first time that adherence to established legal rules has resulted in enabling bad men to gain a temporary advantage. This motion, however, is made on behalf of the creditors of Lewis, who may have, at least, an equal equity with the creditors represented by the assignee. For, according to the allegation of the bill, the property now in question is the property of Lewis, and does not appear to be any part of the goods fraudulently acquired by the bankrupts and Lewis from the creditors of the former. Nor is it alleged to have been acquired with the funds of which the defendant has been declared a trustee, if that could alter the case.

The powers of courts of bankruptcy in the collection of assets can only be exercised pursuant to law, and whenever it becomes necessary for the assignee to sue a stranger to the bankruptcy proceeding, he must proceed against him as any other plaintiff in a like case would have to proceed, that is to say, by a plenary suit at law or in equity. There is nothing in the bankrupt law which deprives parties claiming property of which they are in possession of the usual processes of the law in defense of their rights. So held where the bankruptcy court took property by a summary

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process out of the hands of one who claimed the right of possession under a lien and admitted the general property to be in the bankrupt. (*Marshall v. Knox*, 16 Wall. 551.) So where one claims the absolute property in a fund as against the assignee, the assignee must litigate the claim in a plenary suit at law or in equity. (*Smith v. Mason*, 14 Id. 419.)

The present is more clearly a case to be litigated in a plenary suit. The decree against Lewis in California can only be made available in this district by obtaining a judgment here, as the plaintiff is seeking to do. The decree will be conclusive evidence if there is no objection made to the jurisdiction of the court pronouncing it; but the defendant Lewis has a right to make that defense, and no personal judgment can be pronounced until he is served with process. The property can never be applied to the payment of the decree in California until it has been reduced to judgment in this court. An assertion that a thing is assets does not make it so, nor can any *prima facie* showing be so plain that a court will be justified in proceeding to determine a man's case in the absence of due notice to him. Probably everything alleged in the bill touching the proceedings in California is true; but the defendant has a right to be heard upon that. He has a right to insist that he be duly served with process, and then he has a right to answer and deny the allegations of the bill. To proceed after he has objected to his non-residence and the service on him out of this district would be a plain case of usurpation, as it seems to me, unless the fact that there is property here subject to the jurisdiction of this court justifies further proceedings. Such justification must be found, if at all, in section 738 of the R. S. of the United States. That section provides: "When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant of nor found within the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear," etc. Upon proof of the

service of the order the court is authorized to proceed to the hearing and adjudication of the suit to affect the property of the absent defendant in the district only.

In my judgment this section was only intended to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to some specific property, real or personal, and not cases in which it is sought to reach and appropriate the general property of a defendant to the payment of his debts. By the words "legal or equitable lien or claim against real or personal property," congress intended to reach every case in which there should be any sort of charge upon a specific piece of property capable of being enforced by a court of equity. This is manifest to my mind from the section as it stands, but when we look to the act of March 3, 1875, which was evidently intended as a substitute for section 738, all doubt vanishes.

Such expressions as were obscure in the latter section are by the former made clear. Section 8 of the act of 1875 provides "that when in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district," etc., following the language substantially of section 738, with a provision that the adjudication shall only affect the property "which shall have been the subject of the writ." Nothing, it seems to me, can be plainer than this. In case the absent defendant does not appear, it is only the property "which shall have been the subject of the suit" which is to be affected. I must hold that there is nothing in these sections which helps the plaintiff here. Indeed, this latter section limits the jurisdiction, such as it is, to suits in the circuit court.

Having reached the conclusion that, since the appearance of the defendant to object to the jurisdiction, this court cannot proceed further, there is no need to go on and decide the other points made on the motion. But I am constrained to say that it has seemed to me the assignee is not in a position to maintain this bill, which is a creditor's bill, he

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Point decided.

not having exhausted his legal remedy in this jurisdiction. That he has a legal remedy on the California judgment, seems plain. An action will lie, at law, upon it; a judgment can be obtained here, and an execution can be issued against the property of the defendant now in the hands of the receivers—that is, there is no legal impediment to such a course. Whatever difficulties arise to prevent a successful pursuit of legal service, come from the fact that Lewis is not a resident. But for that fact, a suit at law would lie against Lewis, with an attachment against this very property.

As I now look at this case, stripped of its surroundings of bankruptcy and fraud in California, it becomes an attempt by an assignee to avail himself of the extraordinary powers of a court of equity for the purpose of appropriating the general property of a defendant, in the first instance, to the payment of his debts—a thing which, so far as I am informed, has never been done. I regret that, moved by a desire to aid the creditors who have been defrauded by the bankrupts and this defendant, Harris Lewis, I have made an order which, upon full consideration, cannot stand.

Let an order be entered vacating the order of November, 1880, appointing R. L. Shainwald receiver in this case, and also dismissing the plaintiff's bill.

WILLIAM BYBEE v. A. W. HAWKETT ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 13, 1880.

REMOVAL OF CAUSE.—Under the second clause of section 2 of the act of March 3, 1875, any suit mentioned therein is removable whenever it involves a controversy wholly between citizens of different states and which can be fully determined as between them, upon the petition of either one or more of the plaintiffs or defendants actually interested in such controversy, and it is immaterial whether such controversy is considered the main or principal one in the suit or not, or what other controversies or parties are incidentally or otherwise involved in it.

Before DEADY, District Judge.

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Addison C. Gibbs and B. F. Dowell, for the plaintiff.

E. C. Bronnaugh, for the defendants, Jesse and E. C. Robinson.

DEADY, J. This suit was commenced on June 18, 1879, in the circuit court of the state for the county of Jackson against the defendant, Hawkett and nine others, and after a weary waste of wordy, confused, and iterated contention, covering three hundred and twenty-seven pages of closely written legal cap, consisting, among other things, of the complaint, the supplemental and first and second amended complaints, motions to strike out, demurrers, answers and replications, it was brought to an issue with two additional defendants, on March 31, 1880.

On June 8, 1880, two of the defendants, Jesse Robinson and E. C. Robinson, filed their petition and bond for the removal of the suit to this court under section 2 of the act of March 3, 1875 (18 Stat. 470), alleging therein that the plaintiff is a citizen of Oregon and that the defendant Hawkett and the petitioners are citizens of California, and "that there is a controversy in this suit which is wholly between the said plaintiff and the said defendants," Hawkett and the petitioners, "which controversy can be fully determined as between them;" and finally determined without the presence of the other defendants or any of them as parties in the cause.

On September 3, 1880, the petitioners filed a copy of the record of the suit in this court; and on November 9, the plaintiff moved to remand the cause to the state court. The motion to remand is based upon the following grounds: 1. The application to remove was not made in time; 2. "All the defendants are not of another state"—meaning, I suppose, that they are not citizens of another state than the plaintiff; 3. All the defendants did not join in the application; and, 4. "The controversy involved in said suit cannot be fully determined between the parties thereto, without the presence of Magruder and Haymond, two of said defendants."

The facts and allegations of the case to be considered in

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disposing of the motion are: That on July 26, 1878, the plaintiff being the legal owner of certain mining property known as "the Taylor claims," situate in Josephine county, Oregon, and described as lot 5 in section 35 south, of range 7 west, and two certain water rights and ditches approximate thereto, sold the undivided two thirds thereof to the defendants, Hawkett and E. C. Robinson, by a written agreement of that date, wherein and by it was agreed between the parties thereto:

1. "To mine and operate said mining property as a company."

2. That the said defendants would "pay and assume the following debts," to wit: To James Neely, administrator of Evan Taylor's estate, two thousand seven hundred and eighty-four dollars and fifty-six cents; Kasper Kubli, eight hundred and eighty-two dollars and sixty-eight cents; Dan Green, five hundred dollars; William Smith, five hundred dollars; and pay to the plaintiff, one thousand four hundred and thirty-two dollars; in all, six thousand ninety-nine dollars and twenty-four cents, "said amounts to be paid down, or on such time as may be agreed upon by the said defendants and the persons to whom said debts are due."

3. That said defendants would put upon the property, at their own expense, "such improvements and additional machinery as may be necessary;" but such expense and "the amounts" aforesaid were "to be repaid" to said defendants "out of the profits taken out of said mines," before any "dividends" were paid to the members of the company; but thereafter the said profits were "to be equally divided between the three members of said company;" and,

4. That said property, together with the improvements thereon and thereafter put on, "are to be held as a lien and security for the payment of the debts above specified."

On the day of this agreement said Hawkett and Robinson paid three thousand seven hundred and sixteen dollars and fifty-six cents upon said debts, to wit, the debt to Neely in full, five hundred dollars to Kubli, and four hundred and thirty-two dollars to the plaintiff, and gave their notes for

the remainder, the one to Kubli being also signed by the plaintiff. The debts of Green and Smith remain unpaid, the latter not having become due until March, 1880, and the former having been taken up by the plaintiff. Judgment has been obtained against the makers upon the note to Kubli, and an action is pending upon the one given to the plaintiff, in which the property in question was attached on June 2, 1879. It is also alleged by the plaintiff that one William Irwin was the equitable owner of an undivided third of said property, and that Hawkett and Robinson, in consideration of the sale to them of said interest, agreed to pay to and for said Irwin the sum of two thousand five hundred dollars, in pursuance of which they paid to two persons one thousand dollars in cash, and gave their promissory note to the wife of said Irwin for three thousand one hundred and twenty-eight dollars and thirty-three cents, which is still unpaid and now held by the defendants Gazley and Fink; and also their note signed by the plaintiff to the defendants Kubli and Bolt for eighty-five dollars and forty-three cents, which the plaintiff has since paid; and promised to pay the plaintiff eighty-six dollars and twenty-four cents, then due from said Irwin to him, which promise they have not kept. In the action pending against Hawkett and Robinson aforesaid, the plaintiff has included the last two items, amounting to one hundred and seventy-one dollars and sixty-seven cents. The plaintiff claims that three thousand eight hundred and eighty-two dollars and sixty-eight cents of the indebtedness which Hawkett and Robinson assumed remains unpaid, and that there is a lien upon the property in favor of the person to whom it is now due.

On March 17, 1879, Hawkett sold his interest in the premises to Robinson; and the latter in his answer denies that Irwin had any interest in the mine, or sold or delivered any to himself or Hawkett; and alleges that the several promissory notes given on account of the debts assumed by himself and Hawkett were given and received as payments thereof, and that the original debts were thereby extinguished, and the liens, if any, discharged; that the debt of Green was not paid because he refused and still refuses to

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relinquish a claim to one of the water rights in question, as he was bound to do.

The plaintiff also alleges that the defendant Jesse Robinson, the father of E. C. Robinson, was a secret partner in this transaction with Hawkett and his son, but this allegation is denied by the answer of each of the Robinsons.

On May 13, 1879, E. C. Robinson mortgaged an undivided two thirds of the property to the defendants Benjamin Haymond and C. Magruder, to secure the payment of his note to them for two thousand two hundred and ninety-five dollars; and on May 14, 1879, mortgaged the same interest to Jesse Robinson, to secure the payment of his note to him for four thousand nine hundred and seventy-five dollars.

The plaintiff alleges that the three thousand eight hundred and eighty-two dollars and sixty-eight cents—the unpaid portion of the indebtedness aforesaid—is a lien upon the property prior to the lien of said mortgages, both on account of the terms of the contract of sale of July 26, 1878, and as a “vendor’s lien for the purchase money;” and that the alleged mortgage to Jesse Robinson is fraudulent and void as against said liens, for want of consideration, and was made to cheat and defraud the plaintiff out of his just claims against the defendants Hawkett and Robinson; and that each of said mortgagees at and before the taking of such mortgages had actual notice of the agreement of July 26, 1878, and that each of the debts aforesaid “were due for the purchase money for said property.” The answer of each of the Robinsons and that of Haymond and Magruder deny the allegations of the complaint in this respect, and assert the integrity and validity of the mortgage to Robinson.

The plaintiff also alleges that the defendants Hawkett and Robinson have taken out of the mine three thousand dollars’ worth of gold dust which they have failed to account for, but this is denied by the answer of Robinson.

The defendant Hawkett has not answered. He and E. C. and Jesse Robinson are citizens of California. The plaintiff and the rest of the defendants, namely, Irwin, Smith, Kubli, Gazley, Fink, Haymond, and Magruder, are citizens of Oregon.

A receiver was asked for and appointed by the state court, and the property is still in his possession. An injunction was also allowed against the Robinsons.

The complaint asks that an account be taken of the product and expense of the mine since August 21, 1878; that the priority of the liens be determined; that said contract be enforced; that Hawkett and the Robinsons be required to pay the debts aforesaid and the costs of this suit, and that in default thereof their interest in the property be sold and the proceeds applied to pay the same according to their priority.

On the argument of the motion the objection that the petition for removal was not filed in time was abandoned. The other grounds of the motion are, in effect, that all the defendants are not citizens of California, and did not join in the petition for removal; and that the controversy in the suit cannot be determined without the presence of the defendants Magruder and Haymond.

This removal, if sustained, must rest upon section 2 of the act of March 3, 1875 (18 Stat. 470), which reads: "That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined, as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may

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remove said suit into the circuit court of the United States for the proper district.”

In *Removal cases*, 10 Otto, 468, it was held by the supreme court that under the first clause of this section, where a controversy involved in the suit “is between citizens of one or more states on one side, and citizens of other states on the other side, either party to the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to the removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. (*Coal Co. v. Blatchford*, 11 Wall. 174.) Under the new law the mere form of the pleading may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists.”

The opinion of the court was announced by the chief justice, and while the court was unanimous in its judgment concerning the cases under consideration, Justices Bradley, Strong, and Swayne dissented from so much of the opinion as seemed to assume that under the first clause of section 2 of said act of 1875 a removal could not be had unless each party to the controversy is “a citizen of a different state from that of which either of the parties on the other side is a citizen, and held,” that a “controversy” within the meaning of the constitution and the act may exist between citizens of different states and also of the same state, but that notwithstanding, when any of the parties to such controversy is a citizen of a different state from any other of such parties—when “any of the contestants on opposite sides of the controversy are citizens of different states,” a removal may be had by such party.

In *Gaines v. Fuentes*, 2 Otto, 20, Mr. Justice Field said: "A controversy was involved in the sense of the statute (March 2, 1867, 14 Stat. 558) whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination."

In this case there is a controversy: 1. Between Bybee and Jesse Robinson as to whether the latter was a member of the firm of Hawkett and Robinson, and is therefore liable to him accordingly; 2. Between the same parties as to the validity and effect of Robinson's alleged mortgage; 3. Between Bybee and Hawkett and the Robinsons, one or both of them, as the case may be, concerning the alleged liens of the debts assumed and alleged to have been assumed by Hawkett and Robinson; and, 4. Between the same parties concerning the working and disposition of the products of the mine.

These controversies are all between citizens of different states, and the parties to them also stand in the pleadings as plaintiffs and defendants in the suit—Bybee, a citizen of Oregon, on the one side, and Hawkett and the Robinsons, citizens of California, on the other. It matters not what other controversies or parties there are in or to the suit. Under even the first clause of the section, and according to the restrained construction put upon it by the majority of the court in the *Removal cases*, *supra*, the existence of these controversies in the suit authorizes its removal upon the application of either of the parties thereto, that is, all of the parties on either side of them.

But Hawkett did not apply for the removal, and although he has now no interest in the subject-matter of the suit, and might therefore be regarded as a mere nominal party, still, as it is claimed that he is personally liable to the plaintiff in this suit, upon his alleged promise to pay the debts assumed by Hawkett and Robinson at the time they purchased the property, it will be assumed that the cause was not removable under the first clause of the section.

The second clause of the section has not been passed upon by the supreme court; but in *Taylor v. Rockefeller*, 18 Law Reg. 301, Mr. Justice Strong expresses the opinion

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that under this clause, whenever, in a suit mentioned in the section, there is a controversy, even if it is not the main controversy therein, which is wholly between citizens of different states, and which can be fully determined as between them, then any one of the plaintiffs or defendants actually interested in such controversy may remove the suit into the circuit court. He says: "The right of removal is given where any one of those controversies is wholly between citizens of different states, and can be fully determined as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause 'a controversy which can be fully determined as between them,' read in connection with the other words, 'actually interested in such controversy,' implies that there may be other parties to the suit, and even necessary parties, who are not entitled to remove it. * * * Indeed, according to the literal reading of the statute (a reading quite in harmony with the constitution), the right of removal, and the jurisdiction of this court, exist, though the controversy between the plaintiffs and defendants, who are the petitioners for the removal, be not the main controversy in the case. * * * And there is no necessary embarrassment attending such removal. The entire suit is removed because of the controversy it involves between citizens of different states, and the circuit court, having thus obtained jurisdiction, is competent to determine all the controversies involved between the plaintiffs and the other defendants. The other questions are regarded as incidental."

It is difficult to conceive of any other effect being given to this clause. Its language is so clear and explicit there is no room for misconstruction. It must be taken to mean what it says and say what it means. There is no suggestion of any particular kind or degree of controversy, as a main or principal one, or a minor or incidental one. So that the controversy is wholly between citizens of different states, and one which can be fully determined as between them, the right of removal exists in favor of any plaintiff or defendant in the suit, actually interested in such contro-

versy. All the controversies which I have mentioned as existing in this case come within this category. They are wholly between citizens of different states, and can be fully determined as between them, and the petitioners for the removal are actually interested in them.

The grant of judicial power to the United States expressly includes all such controversies (Const. U. S., art. IV, sec. 2), and its courts are not precluded from its exercise because other parties and controversies are or may be incidentally or otherwise involved in the suit for the determination thereof or in which they exist.

In a case lately decided in the supreme court (*Railway Co. v. Mississippi*, 102 U. S. 141), where it was held that a case arising under an act of congress was removable, under section 2 of the act of 1875, Mr. Justice Harlan, in speaking for the court, says: "That it is not sufficient to exclude the judicial power of the United States from a particular case; that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

But even upon the theory that the controversy which authorizes the removal and gives jurisdiction to the circuit court, must, in some way or sense, be the main or principal one, this is a plain case for removal. For instance, if there is any principal controversy in this case, it is as to whether the debts alleged to be due the plaintiff and sundry of the defendants, citizens of Oregon, are secured by a vendor's and other lien upon this property, and upon one side of which are the defendants Hawkett and the Robinsons, citizens of California, and on the other the plaintiff and the rest of the defendants except Haymond and Magruder; and as to them, if the liens are found not to exist, the controversy is fully determined without affecting them, while if the conclusion is otherwise, they are only incidentally interested in the controversy by reason of their interest in the

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surplus, if any, after the satisfaction of said debts and the discharge of the liens. They are not actually parties to this controversy, however they may be interested in the result of it. (*Donohoe v. Mariposa Land Co.*, 5 Saw. 166; *Osgood v. Chicago D. & V. Ry. Co.*, 6 Biss. 336.)

Again, the controversy as to whether Jesse Robinson is a member of the firm of Hawzett and Robinson, or Hawzett, Robinson, and Bybee, is a distinct and substantial controversy existing wholly between the plaintiff and himself or the plaintiff and the defendants, who are citizens of Oregon, and alleged to have claims against said firm growing out of the sale of the mining property, and said Robinson; and in either case it is a controversy wholly between citizens of different states, and can be fully determined as between them. The same may be said of the controversy concerning the validity and priority of Jesse Robinson's mortgage; and upon either of these grounds he is clearly entitled to have this suit removed to this court without any other party joining in the application.

Besides, although it is not in so many words so alleged, practically this suit is brought for an accounting between the members of the alleged firm of Bybee, Hawzett, and the Robinsons, and for a dissolution of the same and a sale and distribution of its effects. This is another distinct and substantive controversy in the case, and arises wholly between the plaintiff, a citizen of Oregon, and Hawzett and the Robinsons, citizens of California, and does not even concern the other defendants.

The motion to remand is denied.

MARY LEONARD v. WILLIAM GRANT.

CIRCUIT COURT, DISTRICT OF OREGON.

DECEMBER 15, 1880.

1. PLEA TO THE JURISDICTION.—The beginning and conclusion of.
2. ALIEN WOMAN—MARRIAGE OF, TO A CITIZEN.—Under section 2 of the act of February 10, 1875 (sec. 1994, R. S.), an alien woman of the race or class of persons that are entitled to be naturalized under existing laws,

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who is married to a citizen of the United States, becomes by that act a citizen of the United States; and such admission to citizenship has the same force and effect as if such woman had been naturalized by the judgment of a competent court.

3. SAME.—The clause in the statute aforesaid, “might herself be lawfully naturalized,” does not require that the woman shall have the qualifications of residence, good character, etc., as in case of admission to citizenship in a judicial proceeding, but it is sufficient if she is of the class or race of persons who may be naturalized under existing laws.

Before DEADY, District Judge.

THIS action is brought by the plaintiff, the widow of the late D. G. Leonard, against the defendant as administrator of his estate, to recover the sum of six hundred and twenty-four dollars and thirty cents, with interest, the same being the one third of the rents and profits of the real property of the deceased, in which the plaintiff was entitled to dower, received by the defendant as such administrator, between the death of said Leonard, on January 16, 1878, and the sale of said property by the defendant, on February 22, 1879. The plaintiff alleges that she is a citizen of the republic of Switzerland and an alien, and that the defendant is a citizen of Oregon. The answer of the defendant denies that the plaintiff is a citizen of Switzerland and an alien, and avers that she is now and long since and prior to January 16, 1878, has been a citizen of the United States and of Oregon.

C. J. MacDougall, for the plaintiff.

George H. Durham, for the defendant.

DEADY, J. By the stipulation of the parties the cause was submitted to the court for trial upon the issue made by this plea and the admissions in such stipulation, which are: 1. That the plaintiff is a native and citizen of the republic of Switzerland; 2. That D. G. Leonard was a citizen by birth of the United States, and at his death and for twenty years prior thereto was a citizen of Oregon; 3. That the plaintiff was married to said Leonard in Oregon on July 19, 1875, and lived with him therein, as his wife, until his death, and still resides here.

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The matter contained in the answer is doubtless intended as a plea to the jurisdiction, but no such or other application is therein made of it. It does not commence with the usual allegation that the court ought not, on account of the fact stated in the plea, to take cognizance of the action nor conclude with the proper prayer, *si curia cognoscere velit*, whether the court will take cognizance of the action (3 Chit. 894), but with a prayer for a judgment for costs and disbursements, which is superfluous and improper in any action, as they are given or withheld as an incident of the action and according to the final judgment in the case.

One of the admissions in the stipulation is that the plaintiff is a native and citizen of Switzerland. If this be taken as literally true, then there is no doubt that this court has jurisdiction of the action. But taken in connection with the rest of the stipulation and the argument of counsel, I suppose it may be regarded as an inadvertence and as intended only as an admission that she was such citizen by birth and until the time of her marriage.

These preliminary matters being disposed of, the case turns upon the decision of the question, Is the plaintiff a citizen of the United States? and this depends upon the construction to be given to section 2 of the act of February 10, 1855 (19 Stat. 604; R. S., sec. 1994), which reads, in the latter, as follows: "Any woman who is now or may hereafter be married to a citizen of the United States, and might herself be lawfully naturalized, shall be deemed a citizen."

The plaintiff being an alien entitled to be naturalized, and having married a citizen of the United States, the defendant contends that she is within the purview of this statute and therefore a citizen of the United States; to which the plaintiff replies, that she was never absolutely a citizen of the United States, but was only "deemed" to be such citizen by force of the statute, that is, was only taken, considered, or supposed to be one because she became the wife of a citizen, which assumption or supposition ceased with the fact upon which it was based—the termination of the relation or state of marriage between her and her late husband.

The American statute is substantially a copy of the British one of 7 and 8 Vict., c. 66, sec. 16, 1844, which provides "that any woman married, or who shall be married, to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject."

In *Reg. v. Manning*, 2 Carr. & Kir. 886 (61 Eng. C. L.), it was held under this statute, that a Swiss woman married to an English subject was not entitled to be tried by a jury *de medietate linguæ*, as provided in the case of aliens, in the 28 Edward III, c. 13, and George IV, c. 50, sec. 47, upon a charge of murder.

In considering the British statute, Pollock, C. B., after citing it, said: "The obvious, plain, and natural inference from that appears to me to be, that she should be considered exactly as if she had been naturalized by act of parliament, or as if she had been a natural-born subject." And Wilde, C. J., in delivering the opinion of the court in the exchequer chamber, whither the cause had been reserved for "the consideration of the judges upon the question, 'Was the female prisoner entitled to a jury *de medietate linguæ*?' " said: "It appears to me that the general intention of the legislature in this act of Victoria is to make the woman a British subject. * * * With respect, therefore, to the prisoner, we can discover no intention whatever in this act of parliament to do more or less than to make her a British subject."

The only decisions which have been found under the American act are *Burton v. Burton*, 1 Keys, 350, and *Kelly v. Owen*, 7 Wall. 496. In the first case it was held, in the language of the syllabus, that "the alien widow of a naturalized citizen of the United States, although she never resided in the United States, during the life-time of her husband, is entitled to dower in his real estate;" and this, not upon the ground that a state law gave an alien woman situate as the plaintiff was dower in the lands of her husband, but because, under and by force of the act of 1855, *supra*, she became, upon the naturalization of her husband, an American citizen, and was entitled as such citizen to

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dower in her husband's lands after his death, although she was married in 1823, and her husband was not naturalized until 1840, and she was never in the United States until after his death.

In the second case it is only expressly decided that an alien woman that marries an alien, who subsequently becomes an American citizen, is within the purview of the act, as well as if her husband had been a natural-born citizen or naturalized before the marriage, and therefore she is an American citizen from and after the naturalization of her husband.

In delivering the opinion of the court Mr. Justice Field says: "The terms 'married,' or 'who shall be married,' do not refer, in our judgment, to the time when the marriage is celebrated, but to a state of marriage. They mean that whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes by that fact a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her. * * * Its object, in our opinion, was to allow her citizenship to follow that of her husband, without the necessity of any application for naturalization on her part."

In 2 Bish. Law M. W., sec. 505, it is said of this statute "that, by the very act of marriage, citizenship is conferred on a woman who by previous laws was capable of becoming naturalized. His citizenship conferred citizenship on her." And in *Kane v. McCarthy*, 63 N. C. 299, it was held, according to 3 U. S. Dig. 308, "that a white woman, a native of Ireland, and not an alien enemy, who marries a citizen of the United States, is a citizen of the United States, although she always resided in Ireland."

While it may be admitted that none of these authorities expressly decide the point now made by the plaintiff, to wit, that the citizenship imputed to the wife by that of the husband is a qualified one and continues no longer than the reason of it—the marriage with a citizen, still, it is also true that there is not even a hint or doubt in any of them that the citizenship of

the wife thus acquired is a qualified or contingent one, while the language used in all of them is only consistent with a citizenship as enduring and unqualified as if the wife had been actually naturalized upon her own formal application by the judgment of a competent court.

In *Reg. v. Manning* it is said, "she should be considered exactly as if she had been naturalized by act of parliament, or as if she had been a natural-born subject;" and in *Kelly v. Owen*, "his citizenship, whenever it exists, confers under the act citizenship upon her." Besides, in this case, one of the parties that was considered, apparently without question, to be a citizen, was the widow of Miles Kelly, who was herself an alien born, and married to her deceased husband before he was naturalized. So in *Burton v. Burton*, the widow of the deceased naturalized citizen, although never in the United States until after her husband's death, was held to be a citizen without an intimation from court or counsel that such citizenship terminated with the existence of the marriage; and this decision is cited with approbation by the supreme court in *Kelly v. Owen, supra*.

It is also argued by counsel for the plaintiff that it is not to be presumed that congress would naturalize an alien woman absolutely, without her consent, and therefore the act should be construed as only intended, as a matter of convenience, to give her the status of a citizen during her marriage to a citizen. But the answer to this argument is found in the fact that an alien woman who marries a citizen of the United States must be presumed to assent to the obligations, duties, and status which the law provides shall be consequent upon the act of entering into such relation.

No law expressly providing for a temporary or contingent citizenship is known to the legislation of the United States, and so unusual and singular a purpose ought not to be attributed to congress without an explicit provision to that effect. The language of the statute in question, taken in its most natural and apparent sense, conferred citizenship upon the plaintiff, on her marriage with Leonard, and there is nothing in it or the nature or circumstances of the case to warrant the conclusion that congress thereby only in-

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tended to confer upon her a qualified citizenship, a citizenship during marriage.

The phrase "shall be deemed a citizen," in section 1994 of the R. S., or as it was in the act of 1855, *supra*, "shall be deemed and taken to be a citizen," while it may imply that the person to whom it relates has not actually become a citizen by the ordinary means or in the usual way, as by the judgment of a competent court upon a proper application and proof, yet it does not follow that such person is on that account practically any the less a citizen. The word "deemed" is the equivalent of "considered" or "judged;" and, therefore, whatever an act of congress requires to be "deemed" or "taken" as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly. When, therefore, congress declares that an alien woman shall, under certain circumstances, be "deemed" an American citizen, the effect, when the contingency occurs, is equivalent to her being naturalized directly by an act of congress or in the usual mode thereby prescribed.

There is another question in this case that is not so easy of solution. An alien woman who marries a citizen of the United States does not thereby become an American citizen unless, at the time, "she might herself be lawfully naturalized" also. To entitle the plaintiff to become naturalized at the time she was married to Leonard, on June 19, 1875, she should have been: 1. A free white person or a person of African descent or nativity; 2. She must have resided within the United States five years; 3. She must have been of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and, 4. She must have renounced all titles or orders of nobility, if any she had.

If, whenever, during the life of the woman or afterwards, the question of her citizenship arises in a legal proceeding, the party asserting her citizenship by reason of her marriage with a citizen, must not only prove such marriage,

but also that the woman then possessed all the further qualifications necessary to her becoming naturalized under existing laws, the statute will be practically nugatory, if not a delusion and a snare. The proof of the facts may have existed at the time of the marriage, but years after, when a controversy arises upon the subject, it may be lost or difficult to find.

The marriage is a public act of which the law takes cognizance and preserves the evidence, and the race of the woman is generally a fact susceptible of proof; but beyond this, it would be very difficult, if not impossible, to establish, after the lapse of any considerable time, the facts showing her right to become naturalized under the then existing laws.

In *Kelly v. Owen*, *supra*, the question does not appear to have been discussed or considered, but it was assumed that race was the only one of these qualifications that it was necessary for the woman to possess at the time of her marriage; in other words, that as the law then stood, she "should be 'a free white person' and not an alien enemy;" and it appeared affirmatively that one of the parties, who was held to be a citizen, Margaret Kahoe, had not the qualification of residence, because she was only two years in the United States when she was married, and only four years therein when her husband became naturalized. In *Burton v. Burton*, *supra*, the woman was never in the United States until after the death of her husband, and in neither case does it appear that there was any evidence that the women held to be citizens by reason of their marriage with citizens, possessed the qualifications of good moral character, attachment to the principles of the constitution and disposition to the good order and happiness of the United States. The reasonable inference is, that notwithstanding the letter of the statute, "might herself be lawfully naturalized," the supreme court considered that it was only necessary that the woman should be a person of the class or race permitted to be naturalized by existing laws, and that in respect to the qualifications arising out of her conduct or opinions, being the wife of a citizen she is to be

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regarded as qualified for citizenship, and therefore considered a citizen; and tried by this test, it is quite likely that she will be found as well qualified, personally, as her husband, or the thousands of poor, ignorant, and unknown aliens who are yearly admitted to citizenship in the larger centers of foreign population, by the local courts of practically their own creation.

The stipulation in this case is silent as to the qualifications of the plaintiff except that she is a native of Switzerland, and was married to an American citizen in 1875, and has since resided in Oregon, and if it must appear affirmatively that she possessed the qualifications at the time of her marriage to entitle her to naturalization, then it does not appear that she is or ever was a citizen of the United States. Indeed, it does not appear certainly that she belongs to the class or race of persons who "might be lawfully naturalized;" for although she is a native of Switzerland, it does not follow from that fact that she is either a free white person or one of African descent or nativity. But on the argument it was practically admitted that she was a free white person, and the stipulation may be amended in this respect accordingly.

As to the other qualifications, my conclusion is upon the authorities and the reason, if not the necessity of the case, that the statute must be construed as in effect declaring that an alien woman who is of the class or race that may be lawfully naturalized under the existing laws, and who marries a citizen of the United States, is such citizen also.

Upon this construction of the act, and the assumption that the plaintiff is "a free white person," she is a citizen of the United States, and has been ever since her marriage to Leonard, and there must be a finding of fact and law for the defendant accordingly.

Points decided.

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UNITED STATES *v.* J. J. DOYLE ET AL.*

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

DECEMBER 22, 1880.

1. CONSPIRACY.—It is an offense, under the laws of the United States, for two or more persons to conspire to commit any offense against the United States.
2. CONSPIRACY, WHO LIABLE.—If two or more persons conspire to commit any offense against the United States, and *one or more* of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy are liable to the penalty imposed.
3. DEFINITION OF CONSPIRACY.—A conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose.
4. THE EVIDENCE IN PROOF OF A CONSPIRACY will, generally, from the nature of the case, be circumstantial, though the common design is the essence of the charge. It is not necessary to prove by direct evidence that the defendants actually came together and agreed in terms to have that design, and to pursue it by common means. If the acts of the parties and all the circumstances are such as to justify the conclusion that they are by preconcert pursuing the unlawful object, it will be sufficient.
5. RESISTING MARSHAL.—It is an offense against the United States to obstruct, resist, or oppose the United States marshal while executing, or attempting to execute, any lawful writ, process, or order placed in his hands for execution.
6. FUNCTIONS OF THE JURY.—On the trial of an indictment for resisting the United States marshal in executing a writ of restitution, issued upon a judgment of the United States circuit court, the merits of the controversy in the case in which the judgment was rendered, or whether there was error, or hardship in the judgment, are not open for consideration by the jury.
7. PURCHASERS—RIGHT TO POSSESSION.—Purchasers from the Southern Pacific Railroad Company of the lands adjudged to belong to it were entitled to be put in possession of said lands under executions issued upon the judgments so adjudging the title to, and awarding the possession of, said lands.
8. RESISTANCE OF MARSHAL.—Where a body of from thirteen to thirty men, most of them armed, congregate about the marshal, who has a writ of possession in his hands for the purpose of execution, and are informed by the marshal of his official character and purpose, and the marshal attempts to read the writ, but is prevented from doing so by said parties, and informed that his character and purposes are known; that he cannot

*The importance of the case and the points of law involved; the public interest manifested in it; the thoroughness with which the law points were argued, and the careful consideration given them by the judges both during the trial, and again on motion for new trial, it is believed, will fully justify reporting this case.—REPORTER.

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Points decided.

execute the writ; and he is partially surrounded by said parties standing in a semicircle about him from six to twelve feet distant, several of them drawing and leveling pistols at him in a threatening manner, and some of them directing him to consider himself a prisoner, and on peril of his life to surrender his weapon; these acts constitute an assault at common law, and an obstruction and resistance of the marshal in executing the writ.

9. **SAME.**—The fact that the marshal was not actually on the land described in the writ at the time, but was near the line on the adjoining land, waiting the result of a conference then going on with the party to be put out of possession, who was a short distance off, does not affect the character of the acts alleged to be a resistance of the marshal, if he was there with the writ intending to execute it, and this was so understood by the parties charged.
10. **WHO PROTECTED BY THE WRIT.**—The party present to receive possession of the land, and the party present to point out to the marshal the land described in the writ, were a part of the agencies employed in the execution of the writ, and while so engaged, were as much under the protection of the writ as the marshal himself. Any obstruction to the pointing out of the land, or to receiving possession from the marshal, is an obstruction to the execution of the writ.
11. **ASSAULT, WHAT.**—Where several armed parties on horseback, with pistols drawn in a threatening manner, rush upon three men sitting quietly in wagons, who have committed no aggressive act, although having arms, and level their pistols at the parties so quietly sitting in the wagons within short pistol range, and demand a surrender of their arms in a menacing manner, these acts are unlawful, and constitute an assault.
12. **SHOOTING, WHEN JUSTIFIED.**—If defendants rushed upon Clark, Crow, and Hart, with drawn pistols leveled at them in a menacing manner, while the latter, without having committed any aggressive act, were sitting quietly in their wagons in such a manner that Hart and Crow, or any reasonable man in their position, would have good reason to believe that their lives were in danger, and that it was necessary to shoot in self-defense, and having such reason did so believe, Hart and Crow would be justified in shooting, even if they fired the first shot.
13. **SELF-DEFENSE.**—One who is menacingly assaulted with a deadly weapon, and is in danger of being instantly shot down, is not bound to wait till he is actually shot before firing a shot in self-defense.
14. **CONTINUED RESISTANCE OF MARSHAL.**—If defendants made an assault upon the marshal, in the manner indicated in the eighth head-note, and then immediately thereafter made an assault upon Clark, Crow, and Hart in the manner indicated in the succeeding head-notes, the one being present to point out the land, and the other to receive possession, these acts constitute a continuance of the obstruction and resistance of the marshal in the execution of the writ.
15. **RESISTANCE OF MARSHAL.**—Where the marshal is present with a writ of restitution, intending to execute it, and another party, in company with a large number of armed men, delivers to him a paper addressed to him as

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marshal, stating, substantially, that the writs cannot be executed except by force, and that it will require a thousand men to dispossess the parties, and at the same time directing him to leave the county, and details four armed men to conduct him from the neighborhood, and the marshal, believing the party means what he says, and on account of such threats, and for that reason, desists from executing the writ, and withdraws in charge of the men so detailed, these acts constitute both an actual and successful resistance; and all those present aiding, abetting, or approving, are parties to the resistance.

16. EVIDENCE OF CONSPIRACY.—Where the paper delivered to the marshal, referred to in the last head-note, was prepared by other parties with the knowledge and concurrence and at the suggestion of the party delivering it to the marshal, and given to him by the party so preparing, or partly preparing, it, to be so delivered, these acts, in connection with such subsequent delivery to the marshal, are evidence of a conspiracy, at least between the party or parties so preparing it for the purpose, and the party so receiving and subsequently delivering it to the marshal in pursuance of that purpose.
17. ACT OF ONE CONSPIRATOR ACT OF ALL.—Where a conspiracy is once established, the acts of one of the conspirators in carrying forward the objects of the conspiracy are the acts of all the conspirators.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

THIS case is an indictment of a large number of parties, members of what is known in Tulare county as the Settlers' League, both for a conspiracy to resist the United States marshal, and for an actual resistance of the marshal in the execution of a writ of possession issued upon a judgment for a tract of land recovered against one of the settlers by the Southern Pacific Railroad Company. Seven men were killed at the time the marshal attempted to execute the writ. The trial occupied more than a month, and although the charge was oral and reported by a shorthand reporter, every question of law was elaborately argued and reargued during the progress of the trial, and carefully considered by the judges. A verdict having been found against the defendants upon the charge of resisting the marshal, a motion for a new trial was made in part upon various exceptions to the charge. Upon this motion the contested propositions of law were again elaborately argued by counsel, before both judges, who, after further mature consideration, sustained the law points presented in the charge, and overruled the motion. The evidence referred to, and facts

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suggested in the charge, sufficiently present the case to illustrate the points of law announced in the charge.

Philip Teare, United States attorney, and A. P. Van Duzer, assistant United States attorney, for the United States.

H. E. Highton, David McClure, E. C. Marshall, and H. E. McBride, for the defendants.

SAWYER, Circuit Judge. Gentlemen of the Jury: This long trial is about drawing to a close. Counsel have performed their duty; it now remains for the court to perform its duty, and then it will devolve upon you to perform yours. It is the duty of the court to give you the law applicable to this case, and it is your duty to receive it from the court, and to act upon it as so given to you. The declaration of the law is strictly and solely the province of the court, and your functions are simply to ascertain the facts. Of the facts you are the sole judges. You are the judges of the weight of the testimony, and the credibility of the witnesses, and it is for you, from all the testimony in the case, to determine the facts, and when you determine the facts it is your duty to announce that determination, whatever your sympathies may be. You will examine this case fairly, calmly, impartially, and declare the result as it appears to your minds from all the testimony in the case. You will not allow yourselves to be governed by sympathy, or drawn aside from the issues by any outside considerations. You have nothing to do with the punishment; you are simply to determine the question whether these parties are guilty or not guilty of the offenses charged. The responsibility of the punishment is upon the law and the court.

In view of these instructions, gentlemen, you will examine the testimony in the case, for the purpose of ascertaining the facts. The statute of the United States provides that "if two or more persons"—and there may be but two—"if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

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That is one provision of the statutes, gentlemen, and there is a charge in this indictment framed upon that provision charging these defendants, with several other parties who are not on trial, and others to the grand jurors unknown, with conspiracy. There must be two at least to form a conspiracy. If there were any two of these defendants that conspired to commit the offense charged, there was a conspiracy. The conspiracy charged is to commit the offense of resisting and obstructing the United States marshal in the execution of the writ set out. If you find that two or more are guilty of the conspiracy, then you must find those guilty as to whom you find the testimony sufficient to justify such a verdict.

There is another clause, gentlemen of the jury: "Every person who knowingly and willfully obstructs, resists, or opposes any officer of the United States in serving, or attempting to serve or execute any mesne process or warrant, or any rule or order of the court of the United States, or any other legal or judicial writ or process, or assaults or beats or wounds an officer duly authorized in serving or executing any writ, rule, order, process, or warrant, shall be punished," etc.

Now, gentlemen, there are two charges in this indictment. One is that these defendants, with others, conspired to obstruct and resist the United States marshal in executing a writ, and doing some act to effect the object of that conspiracy; and the other is in actually obstructing or resisting the marshal in the execution of the writ. Those two offenses are charged in this indictment, and those are the questions for you to examine. Gentlemen, anything outside of the question as to whether the defendants or some of them are guilty of conspiring and taking some measures to carry out the object of the conspiracy, and of the issue as to whether there was any obstruction or resistance of the marshal in executing the writ, is irrelevant to this matter. There has been a large amount of testimony introduced here, gentlemen, simply as bearing upon the question of conspiracy and intent. When you get beyond that, beyond throwing any light upon those issues, you are to discard it.

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Gentlemen, there was a judgment in favor of the Southern Pacific Railroad Company against the two parties, Storer and Brewer, put in evidence, and a writ of execution issued upon that judgment. You have nothing whatever to do with the merits of that controversy. The law has appointed the courts to settle such controversies. It does not allow the parties to determine their own cases. It provides a judiciary for the purpose of inquiring into and settling legal controversies. When this controversy between the Southern Pacific Railroad Company and Storer and Brewer was tried by the court and the judgment entered, that settled the matter for all time, unless that judgment should in some form be set aside. The merits of the controversy, or as to whether there was any error in the judgment, is not a question for you to consider; it is not before you at all. You are to presume it was settled correctly until otherwise determined. At all events, it was so settled, whether correctly or erroneously does not matter for the purposes of this case.

There was but one way of lawfully preventing the execution of that judgment when demanded by the plaintiff, and that was by an appeal to the supreme court of the United States, taken within the proper time, and in the mode prescribed by law. If no appeal is taken, and the judgment is not reversed, that judgment is just as binding, just as final as though it were a judgment of the supreme court of the United States; it settles the rights of those parties for all time. Even if in the appeal of the three cases that were appealed, those judgments should be reversed, it would in no way affect this judgment. The only way of affecting this judgment is to reverse it, or to set it aside by some other recognized judicial proceeding in the courts; and the judgment being perfected, the time for staying proceedings on appeal having expired, the plaintiff had a right to the execution of that writ, and it was the duty of the government of the United States, if it required all the force within its control, to execute that writ and that judgment; and if the government should fail to execute that writ, while that judgment stands and is still subsisting, it would

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fail to perform the proper and most important functions of the government; and if it should submit to the resistance, anarchy would necessarily come. Any one who conspires to resist the execution of that writ commits an offense against the laws of the United States, and any one who resists the officers in the execution of that judgment and writ commits an offense against the laws of the United States; and those are the offenses that are charged in this indictment, and you have simply to inquire whether those offenses have been committed or not, without reference to any other, or any extraneous questions or considerations.

Now, gentlemen, a conspiracy is "a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose." That is the definition of conspiracy so far as it is applicable to this case. "A combination of two or more persons"—it may be two, but there must be at least two, and there may be more—"by some concerted action to accomplish some criminal or unlawful purpose." Now, there is a charge here that these defendants, with others, concerted together to resist the marshal; that there was a concerted action; that they conspired together to resist the marshal. Gentlemen, the evidence of conspiracy is generally circumstantial. It is not to be supposed that parties enter into a formal written or verbal obligation, or if they do, that the obligation can be proven in terms. "The evidence in proof of a conspiracy will, generally, from the nature of the case, be circumstantial, though the common design is the essence of the charge," that is, the design entertained by each to perform the act. "It is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same objects, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object."

Now, gentlemen, you are to consider, from the circum-

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stances of this case, whether there was a conspiracy to effect this object of resisting the marshal. There is testimony here tending to show that there was a combination of men formed for the purpose of resisting the Southern Pacific Railroad Company in the occupation of the lands claimed by it, and patented to it by the government, being the odd sections of land. There is testimony tending to show that there was a combination for that purpose, and that at an early stage of the case there was an organization and a constitution adopted, with subordinate leagues and a pledge, which the testimony tends to show was taken; whether it does show it or not, is a question for you to consider and determine, and that pledge is in language which follows: "That we recognize no rights of the Southern Pacific Railroad Company to our homes, and that the Southern Pacific Railroad Company or its assignees cannot peaceably enjoy the benefits of our several years of toil to our exclusion; and that in placing our signatures to this resolution, we do it with the firm resolve to stand by each other in the protection of our homes and our families against this fraudulent claim of the Southern Pacific Railroad Company, and that we will stand as one man till our cause is decided by the United States supreme court." That resolution, you will see, gentlemen, is broad in its terms. It makes no exception of the judgments of the lower courts, or of the state courts; but whether it intended to embrace those or not, is a question for you to determine upon all the evidence, and not for me. You have heard the language of the resolution, and I merely call your attention to that as one of the circumstances which are relied upon as tending to show a conspiracy to hold these lands at all events and against all authority.

I shall not go minutely into these other circumstances, of midnight raids, or as to who performed them, or the notices given to persons who purchased of the railroad company against the wishes and consent of the league, nor especially refer to those persons whose houses were burned, nor to those masked men, who, by their threats, induced the agent of the company who was there to grade the lands, to leave;

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nor to the midnight pursuit by masked men of those who dared to purchase of the railroad company; except to call your attention to them as circumstances which are claimed on the part of the prosecution as tending to show the length and breadth of this conspiracy, if there was any such conspiracy. The government claims that there was a conspiracy, and claims that it not only extended to the lands, but, further, that it extended to an intention to resist the process of the lower courts, at least until a decision should be had from the supreme court of the United States. These are circumstances which you are entitled to consider in connection with all the other circumstances in the case. But I shall pass over this without any further comment—without any comment as to the credibility of the testimony, or as to the fact at all, except that the testimony points to this organization as the only one having any cause of complaint against the parties settling upon those particular lands, or purchasing those lands from the company.

We will come down now, gentlemen, to the eleventh of May. The testimony is claimed to show that it was known in that district by many, and by some of the defendants at least, prior to the eleventh of May, that executions had been issued, but the testimony of the witnesses is that they did not know at what time the marshal would appear; that a meeting was called at Hanford on the morning of the eleventh of May—a picnic to take into consideration these matters—at which it was expected Judge Terry would deliver an opinion, or make an address, one or the other, upon the subject. It is in testimony also, gentlemen, that the marshal, with Mr. Clark, the grader, who was familiar with the land and who accompanied the marshal, to point out the land, arrived at Hanford on the evening before, and on the morning of the eleventh of May went in pursuit of Crow and Hart, who were two of the purchasers of the railroad lands, and whom he was directed to put in possession of certain lands, among them the lands claimed and possessed by Braden, and the land claimed and possessed by Storer and Brewer. The testimony tends to show that Hart had either purchased of the railroad company or leased the

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lands held by Braden, and one other piece of land, and that Crow had purchased the land which was embraced in the judgment and writ against Storer and Brewer; and that the company had authorized the marshal to put them in possession of those lands.

Now, gentlemen, those lands being adjudged to be the property of the railroad company, whatever title the railroad company had in them, Hart and Crow had a right to purchase, and no one had any right to interfere with their purchases. Whatever their interest was, whatever their title was, after the title had been adjudged to be in the company Crow and Hart had a right to purchase it, and they had a right, by the assent or direction of the company, to be put in possession under those judgments and executions, and any one forcibly opposing their being put in possession would be acting in violation of the law. Not finding Hart at the town of Hanford, the marshal and Mr. Clark started upon the road towards the land, as the testimony tends to show. They afterwards met them on the way, and first went to Braden's place. Not finding any one there, they removed his goods into the streets or county road, and the marshal delivered formal possession to Hart. They then went to the place of Storer and Brewer. They met Storer upon the way, and after some conversation in relation to the subject, and his being informed that the marshal was there for the purpose of putting Crow in possession, one of them said—Crow, I think—"Why can't we settle it?" and there was some conversation on the subject. They stood aside and conversed by themselves. Storer said: "Well, come on, boys; we will go down and see my partner or my friend." They went down to the land. I need not go over the circumstances. They went into the inclosure on the even section adjoining with Storer—what they call the homestead lot—and the marshal and Clark and Crow and Hart remaining while Storer went to converse with his partner. The testimony also is that the news of the marshal's arrival became noised abroad in Hanford at once; that it became known to the settlers, and among others, to these defendants in various stages of the case, that the

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marshal was there with his writs; that he and Crow and Hart had gone out with a view of executing the writs. Now, gentlemen, you have heard the testimony about how these parties all arrived upon the grounds, but the testimony all tends to show that they gathered their men together, and that some of them—McQuiddy, their leader—and some others requested them to get as many men as they could; that they wanted to make an impressive representation to the marshal. There was a concert of action, as the testimony all tends to show, and it is not contradicted, in going there. They all went there, several miles out of the way, to a place in which they had no personal concern. There appears to have been a concert of action in going there and assembling at the place. They gathered their friends together, as the testimony tends to show, upon the way. Now, if that was so, if they went there by any concert of action, that is one element in the conspiracy. That, of course, does not make a conspiracy alone, but if there was a concerted action on their part, and they all came together from different portions around the neighborhood by concert of action or agreement, I say that is one element pointing to the conspiracy.

They also went there for a purpose. That they all admit. The testimony all shows that they had a purpose in going. If that purpose was an unlawful one, that is another element in the conspiracy. They say now that that purpose was to persuade the marshal not to execute the writ. That was one; another one was that they had heard threats that Brewer's life would be in danger. That was another purpose. This is what they say, the law at this time permitting them to testify in this matter; and as they say it, it is testimony in the case, and you are entitled to consider it; to consider if there was a purpose of some kind in going there, and whether that purpose was a lawful or an unlawful one.

On the other hand, it is alleged that there was another purpose, and that purpose, it is insisted, is shown by the surrounding circumstances to have been an unlawful purpose—a purpose to resist the marshal. The fact that they

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went for a lawful purpose merely you are not to assume, unless you believe that that is the true state of the case—the true condition of things, from all the circumstances in the case. And you are entitled to consider what they did at that time; whether what they did at the time, and constituting a part of the transaction itself, is consistent with what they now declare, subsequently to the event, to have been their purpose, or not.

What was done when they came upon the ground the testimony all shows. It is not substantially contradictory. Storer had just left Crow and Hart; there is no testimony that any ill-feeling was manifested between them; there is no testimony that any dispute or harsh language was used between them that morning. The testimony simply indicates that they were talking in a friendly way. Storer had just left for Brewer, who was plowing in the field near by, both in sight of these parties as they arrived. Now, when the defendants and their associates arrived, seeing a large number of men, estimated anywhere from thirteen to twenty-five or thirty, according to the different views which the several witnesses took of it, whatever the number was, certainly it was not less than thirteen, because that is the lowest number that it is put at—when Hart and Crow saw those men, they made an expression, as the testimony tends to show, which indicated that they expected difficulty. The marshal testifies before you that he directed them to stay where they were, and keep quiet in their wagons, saying that he would go down and meet them. The marshal testifies, and it is not contradicted, that he went down to meet them some fifty or sixty yards from where he had left these parties sitting in the wagon, side by side together, Crow and Hart in one wagon, and Clark in the other. He says he spoke first to these parties and said: "Good morning, gentlemen." A conversation immediately was entered into. He says he told them that he was the United States marshal; that they stated to him that they were aware of that fact. He says, and he repeats it upon several occasions, that they told him he could not execute that writ. They intimated that they had knowledge of the fact that he was

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there with a writ to execute, and he says they told him he could not execute that writ; that he told them they were too fast, and undertook to read the writ, but they told him there was no use in reading the writ at all; that they understood it and did not want to hear the writ; that he put it up; that then immediately several pistols were drawn upon him, and they demanded that he should surrender his arms, and directed him to consider himself a prisoner, one ordering him to surrender his arms upon peril of his life. He testified that he should judge at least half a dozen pistols were drawn upon him; that he heard the clicking of the locks as they were cocked; that they demanded that he surrender his arms, and directed him to consider himself a prisoner. That is substantially the whole of the conversation which is related on that occasion.

The testimony of Wilbur Doyle confirms that, to a certain extent; the testimony of Clark and of the others, including the defendants, confirm it to a certain extent, with the exception that the defendants themselves, some of them, attempt to mitigate the expression, but they admit that the marshal was ordered to surrender his arms and to consider himself their prisoner, and admit that there was one or more pistols drawn. Some of them say they saw only one; the marshal, however, said he saw, he thinks, at least half a dozen.

Now, gentlemen, that is not the language and those are not the acts of persuasion. If the parties came there and used that language, and performed those acts, that is the language of threats, and those acts are acts of menace. The marshal says they were standing at the time in a circle around him, from six to twelve feet off. Now if these parties drew their pistols in that way upon him in a threatening manner, that of itself was an assault; it was an offense at common law. It was a menace; it was an obstruction of itself. And if those acts took place as stated by him there and then, and not contradicted by the other party, that of itself was an obstruction to the marshal in the execution of his writ, provided he was there for that purpose, and intending to execute the writ. Now the fact that he was not

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on the piece of land at that moment of time does not change the aspect of the case. The fact that he was waiting a few moments to see what would be the result of that conference does not affect the case. If he was there for the purpose of executing that writ, and intending to execute it, and was menacingly forbidden to execute the writ, and obstructed in its execution, they knowing that he was there for that purpose, and threatening and menacing him for the purpose of preventing the execution of the writ, that was a resistance within the meaning of the law at that point, before any other or further act was performed; and as I said before, gentlemen, that is not the language of persuasion. And this was done, as all the testimony shows, in a very short time—only a few seconds of time, or a few minutes at the outside. All of this indicated a purpose which the marshal would understand, and which he had a right to understand, as intending to interfere with the execution of the writ. The acts themselves indicated a purpose, and the purpose manifested by those acts could only be a purpose of resistance. Now, if that was their purpose, and you are entitled to consider the natural purport of the acts, you are entitled to consider the outward manifestation of those declarations and acts in determining the question whether what they now say was their purpose was the true purpose or not.

Now, then, if they told him he could not execute those writs, if they drew their pistols upon him and committed an assault by leveling them at him, cocked, and within a few feet distant, demanding the surrender of his arms in a menacing manner, and telling him to consider himself a prisoner, that, I say, was an assault, a forcible obstruction within the meaning of the law, and the act of resistance was made out. And if the purpose of their coming there—if they came there by concert, as it is evident from their own testimony that they did—if they came there by concert and with that purpose, that purpose being an unlawful one—then there was a conspiracy, and you are to determine what that purpose was from all the circumstances of the case. If they came there simply to persuade, simply to defend

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Brewer, if it were necessary, that would not be unlawful. There was nothing indicated by the evidence to show that there was any occasion in fact of defending Brewer from an unlawful assault on that morning. They seem to have come there as volunteers; there is no testimony tending to show here that Brewer and Storer had invited them to come there, or desired them to come and interfere in their affairs; they were there apparently as volunteers, so far as the testimony in the case shows. If there is any testimony to the contrary, you will remember it and give effect to it, gentlemen, because I only state my impression, and you will take your own recollection of the testimony, not mine. Brewer had not been disturbed in his work. He was still plowing, according to the testimony. Storer had just gone out to meet him, after meeting Crow in friendly conversation. There was nothing, then, which had occurred that called upon them to change that friendly purpose they now avow, for there was as yet no occasion for protecting Brewer's life. Nothing else had occurred there, as indicated by the testimony, to require a change of purpose.

Under the circumstances, if what they did is an evidence of what their purpose was, and if they resisted or obstructed the marshal in the sense which I have described to you, then that is evidence that their purpose in coming was to do that thing which they did do, viz., to resist the marshal, whether sufficient evidence or not is a question for you to determine from all the evidence.

If the defendants by concert came there for that purpose, then there was a conspiracy; and if there was a conspiracy, then the act of one is the act of all the conspirators; if there was not a conspiracy, then the act of each party was an individual act; but if there was a resistance in the mode which I have stated, then all the persons who were present aiding and abetting, assenting to or approving of that resistance, are *participes criminis* in the resistance, and it is for you to determine who did aid and abet, who were there present and assenting, and the facts of their being there apparently approving, and not interfering or interposing, if such be the fact, is a circumstance for you to consider in determining

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whether they were assenting and aiding and abetting in carrying out their then present purpose.

Gentlemen, Hart or Crow was there to receive possession of that land described in the writ from the marshal. The testimony tends to show that Clark was there to point out the lands, he being familiar with the locality. They were a part of the machinery or agencies that were there to be employed for the execution of that writ. They were there rightfully; they were there under the protection of that writ, as much so as the marshal himself. In order to give possession to Crow, it was necessary that Crow should be there, and in order to identify the land it was necessary to have some one familiar with it there to point it out. They were there as a part of the machinery of the marshal, a part of the agencies employed for the purpose of the execution of that writ, and were as much under the shield and protection of that writ as the marshal himself; and any obstruction to their receiving the possession which the marshal should attempt to give to them would be an obstruction to the execution of that writ.

Although the condition of things which I have thus far pointed out and supposed here would make out the offense, still, we may proceed further in this matter, and consider subsequent events which the testimony discloses. There was testimony here tending to show that Crow had, on various occasions, made threats against members of the settlers' league. You have heard that testimony, gentlemen, and the theory of the defense is that these parties anticipated that Crow would kill Brewer, and that they came out, as one of their purposes, to prevent that act. Gentlemen, you have heard the testimony in regard to those threats. One complaint was that Crow had, at his house, arms and a large number of cartridges—three hundred cartridges. You are to consider whether or not that is not entirely consistent with a determination on his part simply to use them in self-defense. You have heard testimony as to midnight marauders, tending to show that midnight marauders in disguise were inquiring for him (Crow). The testimony tends to show that the enmity was rather more, or as much, at

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least, on the side of the settlers against him, as that it was entertained by him against the settlers. The testimony tends to show that there was a large combination of the settlers, having many hundred men.

You are to consider whether Crow would be likely to be an assailant against a whole community, or a large part of a community of that kind, or whether it is not more likely that he would confine himself to matters of strictly self-defense under such extraordinary circumstances. It is for you to consider the circumstances, and to give them such weight as you think them entitled to, and determine whether or not all of these threats were not entirely explicable on the hypothesis that he was simply arming himself and carrying his arms for self-defense, and whether the cause for enmity was not as great or greater upon the other side than upon his. Those things you ought to consider, and to give such weight to them as you think they are entitled to receive in determining the acts and the motives of these men. The fact that there was that morning no ill-feeling manifested between Crow and those parties, Storer and Brewer, would indicate that there was nothing dangerous contemplated; but that Crow had then no other purpose than self-defense. Whether it is sufficient or not is a question for you yourselves to consider.

Then you ought to consider whether the testimony tending to show that Crow said he intended to harvest these crops, and if they would put him in possession he would thin their ranks, or expressions something like that, are not also entirely explicable upon the hypothesis that he intended only to act in self-defense. Crow having purchased those lands which had been adjudged to belong to the Southern Pacific Railroad Company, he was entitled to their possession, and if there were crops growing upon those lands, the products of those lands were his; the land being his, the crops were his, and he had a right to harvest them if he could get possession; and you are entitled to consider whether that expression of his complained of is not explicable upon the idea that when put in possession, not anticipating that there would be resistance to the marshal,

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having been placed in possession he would maintain it, if necessary, with force, which he would have a right to do if attacked.

You are to consider whether his conduct, or his threats, were not explicable upon that theory; and whether he simply intended to use his arms for self-defense only. At all events, there appears no testimony that at this time Crow or Hart or Clark advanced one step towards those men who were surrounding the marshal, until those men rushed in a threatening manner upon them. The testimony of all is—the testimony of both parties—that there was a rush upon them; and Mr. Clark, who gives a very graphic, and what appeared to me to be a very candid statement of the facts—whether candid or not is a matter for you to determine—whether true or not is for you to determine. Mr. Clark gives a very distinct narrative of those events, and shows that he was in a position to observe clearly and carefully what took place. Whether he told the truth or not, is a question for you. He tells you that while he sat, with Crow and Hart by his side in the other wagon close to him, the two wagons close together, he saw Harris swing his pistol around, or some other party, about the head of the marshal, demanding his arms, and soon after they dashed up at him (Clark) with drawn pistols. He tells you that there were several with drawn pistols, and that Harris presented his pistol to him and demanded his arms in a threatening tone and manner; that he entered into some colloquy with him; that when they were dashing up, Hart reached down for his gun, and Crow, seeing the movement, told him not to shoot yet, the time had not come; and he tells you, that before the firing commenced Harris stood by him, his horse's head reaching over his wagon wheel; that he stood facing him, and entered into a parley with him, with his pistol drawn and cocked and aimed at him. Wilbur Doyle's testimony indicates that there was a rush up there by defendant's party, but does not indicate that Crow or Hart rushed down to them. In the testimony of Mr. Pryor, he tells you he got there first—I think he said first—and sitting on his horse by the side of Clark, when Hart reached

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for his gun; and that he also heard the expression from Crow, "The time has not come to shoot yet." His testimony, therefore, confirms that of Clark's, confirms Wilbur Doyle and the testimony of the others, that there was a rush up there to Clark, Crow, and Hart, and that there were other pistols drawn.

Now, gentlemen, they, the defendant's party, were the parties then, upon all the testimony (because there is none to the contrary), that were advancing in a threatening manner with arms drawn. There is some loose testimony of Mr. Patterson, that while he was on the way up he saw Hart reaching for his gun; but he does not testify that he presented the gun, and the testimony all indicates that there was no presentation of the gun by him until these parties rushed upon them with drawn weapons. If that be so, if defendants and those with them rushed upon Crow, Hart, and Clark with drawn weapons in a menacing manner, that of itself was an unlawful act, a threatening act. It was an assault on their part if they did it before any attack or aggressive act on the part of the other party occurred.

It is not a matter without doubt as to who actually shot first. Some think one, some the other. Clark thought Harris fired first. He saw him fall. Both the reports were so nearly simultaneous that the weapons of the approaching parties must have been out before they were on the ground. Now, gentlemen, if these parties rushed up there in a threatening manner, with drawn pistols aimed at Clark, Crow, and Hart, they committed an assault which was a breach of the peace, was a breach of the law; and if they did it in such a way that Hart and Crow, or a reasonable man in their position, would have good reason to believe, and should believe, that their lives were in danger, and that it was necessary for them to shoot in self-defense, they would be justified by the law in shooting, even if they shot first. A man who is attacked, who is assaulted with a deadly weapon, who is in danger of being instantly shot down, is not bound to wait until he is shot himself. Then if Hart did shoot first, it does not affect the question, provided he was in such a position that the law would justify him in

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shooting; whether he was in such dangerous position or not is a question for you to determine from all the evidence in this case.

Now, then, whoever it was that provoked that contest, whoever it was that was the assaulting party under such circumstances as placed the other party so assaulted in a position that justified him in shooting to defend himself, that party so assaulting is the one upon whose skirts the blood of those seven men who were killed rests, even if the party thus assaulted was the first to fire. Who it is I do not know. It is for you, not me, to determine from the testimony. If, however, they made this assault in a threatening manner, in the way that I have indicated, before any action upon the part of Hart or Crow, whatever Hart or Crow's internal, unmanifested intention may have been—if the defendants thus did it, they were the assaulting party, and it was a continuation of the obstruction and resistance before commenced to the execution of the writ by the marshal. These things all occurred in a very few seconds. The testimony of all the witnesses is to that effect. The marshal testifies that it was all over before he succeeded in getting from the ground upon which he had been thrown by the rushing horsemen, as they started for Clark, Crow, and Hart, and getting the dust out of his eyes so that he could see.

Gentlemen, you are to determine whether that was also a continuance of a resistance which had before already begun and been perfected sufficiently within the law or not. Immediately after, or soon after the firing ceased, McQuiddy and another party of settlers come upon the ground. The marshal immediately meets him. McQuiddy informs him at once that he must leave—gives him a paper and tells him to take it and leave. This is the testimony of the marshal, and it is not contradicted. The marshal undertook to read it, but McQuiddy was so impatient that he would not even give him time to read it, according to the testimony, if you believe it to be true, and I believe there is no contradiction of that testimony—if there is, you will recollect it. McQuiddy's action shows for itself that he, at least,

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contemplated resistance. He was grand master of the organization. This paper was prepared in advance. It is addressed to the United States marshal. It was delivered to him. The marshal had a right to presume it was intended for him, and that it meant what it said. It showed that this trouble, or some other trouble, had been anticipated, and preparation had been made for it by some action taken prior to their coming upon the ground. It is addressed "To the United States marshal," and reads as follows: "Sir, we understand that you hold writs of ejectment issued against the settlers of Tulare and Fresno counties, for the purpose of putting the Southern Pacific Railroad in possession of our lands." Whoever wrote this, and McQuiddy adopted it because he presented it, if you believe the testimony, was aware of the fact that the marshal held writs, and that he was there for the purpose of executing them, and it was addressed to him in view of that fact. After stating their equities again it proceeds: "We hereby notify you"—you, the United States marshal—"that we have had no chance to present our equities, etc., and that we have, therefore, determined that we will not leave our homes unless forced to do so by superior force; in other words, it will require an army of at least a thousand good soldiers against the local forces that we can rally for self-defense; and we further expect the moral support of the good law-abiding citizens of the United States sufficient to resist all force that can be brought to bear to perpetuate such an outrage."

Now, this is McQuiddy's declaration to the marshal upon the ground, in this document. There is no conflict in the evidence that this was delivered; there is no conflict as to its contents. Gentlemen, that is not the language of persuasion; that is the language of menace; it is the language of threat, and if the marshal believed that language to express the true intent of the parties and acted upon it, as the marshal said he did, then it is not only a resistance, but a successful resistance. In connection with this delivery and command to leave, McQuiddy detailed four armed men to take the marshal out of the country, and

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told him not to go to Hanford. The marshal tells you he gave his orders in an imperious manner, and he understood and believed he meant what he said, and under the circumstances he had a right to believe that he meant it. That is the language of menace, the language of resistance; not the language of persuasion. If you believe, then, that the marshal was there, as he says he was, for the purpose of executing that writ, although he was waiting for this interview between these other parties, but was intending to go on and execute the writ, and that he was deterred from doing it by these threats; that he left the country, and left with the writ unexecuted by reason of them; there was a resistance and a continuance of any resistance before commenced, and all those who were connected with McQuiddy, and who aided or abetted, or manifested their approbation of it in any way, as several did by their remarks, are equally guilty of the resistance.

Now, gentlemen, this also indicated a predetermination. This the testimony shows, and it is uncontradicted. It is all testimony derived from the defense. The testimony shows that this paper was prepared before coming there. The most of it had been prepared at least as early as the day before, and that shows then a preconcerted purpose on the part of somebody, certainly on the part of McQuiddy. That is to say, you have a right to infer it; whether it does sufficiently show it or not is a question for you to determine, but it indicates it. It tends to show a preconcerted purpose, because it was prepared at least the day before. The testimony indicates that it had been prepared at San Francisco and sent up; there must have been more than one engaged in the preparation. Now, then, if McQuiddy went there with this predetermined purpose, in concert with others, there was a conspiracy also, as well as an actual resistance. It is for you to determine from the facts whether that conspiracy existed or not, and who conspired with him.

The defendant, Doyle, is connected with this paper, by his own testimony, and his own testimony alone. The defendant, Doyle, testifies that McQuiddy gave the paper to him the day before, on the tenth, and requested him to make some addition to it. He says he did not like it very well,

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although he saw nothing very bad in it, and did not do anything that night; but the next morning he tells you that McQuiddy came there and asked him if he had got the paper, and if he had added anything to it. He told him he had not. McQuiddy manifested some impatience, and told him that the marshal had gone out to Braden's and Storer's, as he supposed, and that Crow and Hart had also gone; that it was time for haste, and he hurried him up, and therefore he took it and added what followed; he added the reasons to it: "We present the following facts: 1. These lands were never granted to the Southern Pacific Railroad Company;" a fact which had been determined to the contrary by the court, and determined for all time, unless that judgment should be reversed, so far as that case is concerned. "2. We have certain equities that must be respected, and shall be respected." And, again, "We, as American citizens, cannot and will not respect them;" that is, the rights of the Southern Pacific Railroad.

Now, he knew, because McQuiddy told him, that the marshal had gone with the writ to put Crow in possession of Storer's and Brewer's land. He was urged to haste. He dictated this addition; he said, in answer to a question from the court, that it was not dictated by McQuiddy; it was his own dictation—it was his own language. Now, then, when he wrote that language he had reason to believe from the conversation, whether he did so believe or not, that it was to be used—to be delivered to the marshal. The conversation, McQuiddy's anxiety and hurry to get off, his impatience to hurry him up, indicated all this. It was addressed to the marshal; he read it; and by appending this addition to it he adopted the whole of it. When he appended this, and delivered the whole of it back to McQuiddy, with this appendage, having signed it, "By order of the league," or "By authority of the league," he adopted the whole of it. He conferred with McQuiddy in preparing this for the marshal, and when he delivered it to McQuiddy, that was a commendation of and concurrence in those acts between the two, and tends to show that there was a conspiracy, at least between those two. It is ad-

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dressed to the marshal; it is the language of threat, and the testimony tends to show that he knew it was to be used for that purpose, and he, at least, affirmed that it was "By authority of the league."

Now, there have been several other papers put in evidence here, purporting to have been by authority of the league, but none can be traced to the league by direct evidence, and it is denied that they came from the league. It is said that Doyle consulted no meeting of the league as to this document, because there was no meeting; but conceding it to be so, he, at least, affirms that this was by authority of the league, and McQuiddy confirms it by adopting it and delivering it to the marshal, with this statement appended to it. They two act together in concert with reference to the preparation of this document, and for the purpose of delivering it to the marshal, as the testimony tends to show; whether it shows this satisfactorily or not is a question for you to consider.

Then, the testimony shows that McQuiddy immediately rode off from the house; that he went by one direction and Doyle went by another, and they both arrived at Storer's and Brewer's at about the same time, or not far apart; and the testimony tends to identify them all as being upon the ground during some portion of those proceedings. Now that tends to show a preconcert of purpose, of action on the part of these two men at least; and if you believe that they did thus act in concert with reference to that, then there was a conspiracy to do the thing which this document purports to do; and if there was a conspiracy, the act of McQuiddy is the act of Doyle, even although the latter was not on the ground, even if he had not gone upon the ground, because the acts of one of the conspirators, when the conspiracy is once established, in carrying forward the objects of the conspiracy, are the acts of all the conspirators.

Gentlemen, if these acts occurred in the way that I have indicated here, there was a continuance of the resistance of the marshal, which was begun on the first meeting on the ground of those parties. Now, from all this testimony, gentlemen, from the acts of the parties, you must determine

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whether or not there was a concert of action and a common purpose. That there was a concert in going there, the testimony shows, because they agreed upon it. There was a concert for some purpose. The question is as to what that purpose was. Was that the purpose indicated by the acts which they did in fact perform immediately upon getting on the ground in great haste, without even waiting to consult with Storer and Brewer, or was that the purpose which they now, after the act, say was their purpose, a mere matter of persuasion, a mere matter of protecting Brewer in case he should be assaulted with an intent to murder him?

You are to determine this case, gentlemen, from all of these circumstances, and make up your minds: 1. Was there a conspiracy? If there was a conspiracy, who were guilty of that conspiracy? and then, also, was there an actual resistance? If there was, who were guilty of that actual resistance? If there was a conspiracy on the part of some, and not on the part of others, then who are those that are guilty of conspiring? because if Doyle is guilty of conspiring with McQuiddy, he is guilty, although McQuiddy is not on trial. He is indicted, and it is no matter that he is not on trial. If Doyle conspired with McQuiddy, as it is alleged in the indictment that he did, or with anybody else, he is guilty of every act of resistance within the objects of the conspiracy that was performed by any of the other conspirators; he is guilty with the others who carried the object out, even if he did not get there in time to assist personally in the matter.

Gentlemen, as to the credibility of the testimony, you are the sole judges, and as to what it proves. I have pointed out the bearing of the testimony. I will say further, as to what actually took place, what was actually done there, there is scarcely a substantial conflict in the testimony. The conflict is not so much as to what the acts were; there may be some little as to some points of it. You will recollect what those points are. The conflict is not so much as to what acts were actually performed by the various parties there, as it is in regard to the purpose for which those acts were performed. The great conflict is as

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to whether the purpose is what the defendants, long subsequent to the event, and after these lamentable occurrences have taken place, now say was their purpose, or whether that purpose which is indicated by their acts—which is made manifest by their works—was their real purpose; and you are the proper parties to determine whether that purpose which these acts indicate was the real purpose, or whether that which they now say was their purpose, and which they did not, in fact, accomplish, was the real purpose.

Gentlemen, you are the judges of the credibility of the witnesses, and you are to take into consideration their situation in reference to this transaction. Many of these witnesses are defendants to this charge, who, under the law as it now stands, and I think wisely, are permitted to testify; but, gentlemen, you should scrutinize their testimony with care. They are deeply interested in this matter. Seven lives have been lost in this transaction, and they are now at the bar of justice here charged with the offense of conspiring to resist the United States marshal, and of having actually resisted him. They stand here subject, if found guilty, in the discretion of the court, to imprisonment and fine. Now, what effect this situation may have upon their testimony is a question for you to determine. And so with the witnesses on the other side—you are to consider their relation to the transaction, and upon the whole come to such conclusion as you think the evidence justifies. I am free to say that several of these defendants, in my judgment, testified with great fairness. Whether they did or not is a question for you to decide. Some of them, I think, prevaricated; whether they did or not is a question for you to determine. But you are to take all of the testimony and make up your conclusions. 1. Did these parties or any of them conspire, and do some act to carry out that conspiracy? If they did, you will find them guilty of that charge. 2. Did they actually resist in the manner which I have pointed out and defined? If they did, you must find them guilty on that charge.

Now, gentlemen, if you find, in your judgment, beyond

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a reasonable doubt, that these parties, or any of them, are guilty, and fail to give effect to that judgment by a proper verdict, you will prove recreant to your duties as citizens, and violate your oaths as jurors. If, on the contrary, you have a reasonable doubt in the matter, you are equally bound to acquit the parties; but, gentlemen, a reasonable doubt is not an arbitrary doubt; it is not one you may conjure up at will. It must be a doubt which really arises out of the evidence, which is suggested by the evidence, and which really rests in good faith in your minds as a matter of doubt. You will look at this matter as you would if you were investigating it with a desire to ascertain the exact truth in a matter of great consequence to your own interest, and if, upon the whole, your minds rest satisfied of the guilt of these parties, you must find them guilty; otherwise, not guilty.

Gentlemen, in these several aspects you will be called upon to consider this case. I will now instruct you as to the form of the verdict. There are several defendants here. You will look upon their cases in their different aspects, and hence it is necessary for you to understand the form of the verdict which you should render according to the facts which you may find. I have prepared forms here suggesting several categories which you can consider, and adopt such form as you find in accordance with those categories.

The first form is in case the jury find against the defendants on both charges; in case the jury find against the defendants on both charges, the form of your verdict will be as follows: "We, the jury, find the defendants, Doyle, Patterson, Purcell, Brewer, Braden, and Talbot, guilty as charged in the indictment;" that is, if you find them all guilty as charged. If you only find some of them guilty, you will simply insert the names of those you do so find. I merely insert the names so that you will know what the names are, and if you find them guilty, that will be the form of your verdict, in the first category.

2. In case the jury find that some are guilty of conspiracy, and also of resisting the marshal, and some of resisting the marshal only, and not of conspiracy, the form of the verdict

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will be as follows: "We, the jury, find the defendants, Doyle," etc.—as the case may be—naming the persons that are guilty of both charges—"guilty as charged in the indictment;" and the defendants, A, B, etc., "guilty of resisting the marshal, but not guilty of conspiracy."

3. In case the jury find the defendants not guilty of conspiracy, and guilty of resisting the marshal, the form of the verdict must be as follows: "We, the jury, find the defendants, Doyle, Patterson," etc.—naming those found guilty—"guilty of resisting the marshal, as charged in the indictment, but not guilty of conspiracy."

4. In case the jury find the defendants not guilty of either charge, the form of the verdict will be as follows: "We, the jury, find the defendants not guilty."

If the facts as found present any other aspect, adapt the form of your verdict to the facts as found, as, for instance, some guilty, naming them, and others not guilty, naming them.

MOTION FOR NEW TRIAL.

A motion for new trial having been made, and argued by counsel, the court took the case under advisement; and on a subsequent day denied the motion as to all the defendants except Talbot, as to whom a new trial was granted, because the judges were in doubt whether the evidence was sufficient to connect him with the act of resisting the marshal. In regard to all the defendants except Talbot, the judges announced their conclusions as follows:

SAWYER, Circuit Judge. Upon a careful review of the charge in the light of further argument of counsel, and since the excitement of the trial has passed away, I am satisfied that there is no error in the points relied on by counsel. In my opinion the charge is in all respects fully as favorable to the defendants as the law and the evidence would justify. The motion for new trial as to all the defendants except Talbot must therefore be denied. And it is so ordered.

HOFFMAN, J. I have very carefully examined the charge delivered in this case, since the argument of the motion for

Points decided.

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a new trial, and I am entirely satisfied with it. In my judgment it presents the case very fully, and with clearness and precision upon all the points involved. If I were myself called upon to charge the jury again upon the same evidence, I would not desire to modify in any respect, or in any particular take from or add to the charge as delivered by the circuit judge. Finding no error, I concur in the order denying a new trial as to all the defendants except Talbot.

THE UNITED STATES v. THOMAS J. L. SMILEY ET AL.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SEPTEMBER 5, 1864.

1. THEFT OF ABANDONED PROPERTY.—ACT 1825, SECTION 9, CONSTRUED.—The ninth section of the act of congress of March 3, 1825, against plundering or stealing money, goods, merchandise or other effects from or belonging to any ship or vessel, in distress or wrecked, lost or stranded, does not apply to property which has been abandoned by its owners. Property thus abandoned may be acquired by any one who has the energy and enterprise to seek its recovery, without violating the statute.
2. EXTRATERRITORIAL CRIMINAL JURISDICTION.—The criminal jurisdiction of the United States may, in some instances, extend to their citizens beyond their territory, as, for instance, for violation of treaty stipulations by them abroad; for offenses committed in foreign countries where jurisdiction is by treaty conceded for that purpose, as in some cases in China and the Barbary States; for offenses committed on deserted islands or uninhabited coasts, by officers and seamen of vessels sailing under their flag; and for derelictions of duty by their ministers, consuls and other representatives abroad. But except in cases like these (and their extra-territorial character is generally indicated in the law designating the act for which punishment is prescribed), the criminal jurisdiction of the United States is limited to their own territory, actual or constructive. Their actual territory is co-extensive with their possessions, including a marine league from their shores on the sea. Their constructive territory embraces vessels sailing under their flag. Wherever they go they carry the laws of their country, and for a violation of them their officers and seamen may be subjected to punishment.
3. JURISDICTION OF PROPERTY BURIED IN SEA NEAR COAST.—In this case the vessel, which carried the money recovered by the accused, was at the time of its recovery broken up, without a vestige of it remaining. The money was buried in the sand several feet under the water of the sea and was within one hundred and fifty feet of the Mexican shore: *Held*,

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that there was no jurisdiction of the United States over the place or property; and that the jurisdiction of Mexico over all offenses committed within a marine league of its shores, not on a vessel of another nation, was complete and exclusive.

Before Mr. JUSTICE FIELD, and HOFFMAN, District Judge.

THE case was as follows: The steamer *Golden Gate*, belonging to the Pacific Mail Steamship Company, left San Francisco for Panama on the twenty-first of July, 1862, with two hundred and forty-two passengers and a crew of ninety-six persons. At about five o'clock on the afternoon of Sunday, July 27th, while running within three and a half miles of the Mexican coast, she was discovered to be on fire. An examination disclosed that the fire had originated between one of the galleys and the smoke-stack, and it soon became apparent that it was impossible to save her. She was then immediately headed for the shore, and half an hour later struck on a shelving beach of sand about two hundred and fifty feet from the shore, at a point fifteen miles north of the port of Manzanillo. The surf, which was breaking heavily, soon swung her stern around so that she lay nearly parallel with the beach when she went to pieces. At eight o'clock of that evening all that remained visible were her engines, boilers, and wheel frames. Of the three hundred and thirty-eight souls on board only one hundred and forty were saved. The treasure which she carried, amounting to one million four hundred and fifty thousand dollars, was sunk about forty feet inside of the wreck, where in a space of sixty feet square upwards of one million two hundred thousand dollars were subsequently recovered.

Soon after the loss of the steamer was known, a vessel was fitted out by the underwriters to proceed to the scene of disaster and recover whatever was possible of the treasure. The parties employed soon returned and abandoned the idea of finding it. Immediately, another vessel, the *Active*, was sent by a party of capitalists on the same errand, but she returned likewise unsuccessful. In December, 1862, another party of capitalists started another vessel,

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the schooner *William Ireland*, fitted with pumps and wrecking appliances and accompanied by submarine divers, under the command of Ireland, one of the projectors of the enterprise. The men in this expedition succeeded in recovering eight hundred thousand dollars. In August, 1863, they again returned to the wreck and were successful in recovering seventy-six thousand dollars more, when it was believed that any further efforts to secure any additional amount would be unsuccessful. Afterwards, in September, 1863, Thomas J. L. Smiley and others fitted out another expedition with a party of divers and a more complete equipment of diving and wrecking apparatus, and returned in January following, having succeeded in recovering three hundred and three thousand dollars. On a second trip they found thirty-three thousand dollars more; and with this voyage all efforts in that direction were closed. The treasure recovered by Smiley and others was carried in wooden boxes, each containing from five hundred dollars to forty-four thousand dollars, and was stowed in a room near the stern of the ship. The locality where the greater part was found was about one hundred and fifty feet from the shore of Mexico and in from six to nine feet of water. Beneath the water was an equal depth of sand under which was a hard clay stratum. On this hard pan beneath the water and the sand the treasure boxes lay.

Before commencing his operations, Smiley had obtained from the Mexican government a license to explore for the treasure lost. On his return to San Francisco, claim was made by shippers for the specie recovered, but it was not given up, as the parties could not agree as to the amount which the recovering party should retain as compensation for the recovery. The result was that a complaint was made against Smiley and others of his company, and in March, 1864, they were indicted in the circuit court of the United States for plundering and stealing the treasure from the *Golden Gate*, under the ninth section of the act of congress of March 3, 1825, which provides "that, if any person or persons shall plunder, steal, or destroy any money, goods, merchandise or other effects, from or belonging to any ship,

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or vessel, or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States," he "shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and imprisonment and confinement to hard labor not exceeding ten years, according to the aggravation of the offense." (4 Stat. at Large, 116.)

To the indictment a demurrer was interposed on various technical grounds. As the expedition conducted by Smiley was an open one, after all other efforts for the recovery of the treasure had been abandoned, and Smiley was a man of previously good character and standing in the community, the indictment was generally regarded as persecution—as an attempt to coerce the treasure from him without allowing proper compensation to him and his associates for his recovery. The counsel engaged in the case appeared to recognize this. It was, therefore, agreed that the facts stated above should be deemed admitted, and that upon them the following questions should be presented to the court for determination: First, whether the act of congress applied to a case where the taking of the property, of which larceny was alleged, was after the vessel had gone to pieces and disappeared; and, second, whether, if the act covered such a case, the circuit court had jurisdiction to try the offense charged, it having been committed within a marine league of the shores of Mexico; with a stipulation that if the court should be of opinion that the act did not apply to the case, or that it had not jurisdiction to try the offense charged, the demurrer should be sustained. Upon this stipulation the questions were argued.

William Barber, for the prosecution.

John B. Felton and Delos Lake, for the defendants.

By the Court, Mr. Justice FIELD. We are not prepared to decide that the statute does not apply to a case where

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the vessel has gone to pieces, to which the goods belonged of which larceny is alleged. It would fail of one of its objects if it did not extend to goods, which the officers and men of a stranded or wrecked vessel had succeeded in getting ashore, so long as a claim is made by them to the property, though before its removal the vessel may have been broken up. We are inclined to the conclusion that, until the goods are removed from the place where landed, or thrown ashore, from the stranded or wrecked vessel, or cease to be under the charge of the officers or other parties interested, the act would apply if a larceny of them were committed, even though the vessel may in the mean time have gone entirely to pieces and disappeared from the sea. But in this case the treasure taken had ceased to be under the charge of the officers of the *Golden Gate*, or of its underwriters, when the expedition of Smiley was fitted out, and all efforts to recover the property had been given up by them. The treasure was then in the situation of derelict or abandoned property, which could be acquired by any one who might have the energy and enterprise to seek its recovery. In our judgment the act was no more intended to reach cases where property thus abandoned is recovered, than it does to reach property voluntarily thrown into the sea, and afterwards fished from its depths.

But if the act covered a case where the property was recovered after its abandonment by the officers of the vessel and others interested in it, we are clear that the circuit court has not jurisdiction of the offense here charged. The treasure recovered was buried in the sand several feet under the water, and was within one hundred and fifty feet from the shore of Mexico. The jurisdiction of that country over all offenses committed within a marine league of its shore, not on a vessel of another nation, was complete and exclusive.

Wheaton, in his treatise on international law, after observing that "the maritime territory of every state extends to the ports, harbors, bays, and mouths of rivers and adjacent parts of the sea inclosed by headlands, belonging to the same state," says: "The general usage of nations superadds to this extent of territorial jurisdiction a distance

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of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." (Pt. 2, c. 4, sec. 6.)

The criminal jurisdiction of the government of the United States—that is, its jurisdiction to try parties for offenses committed against its laws—may in some instances extend to its citizens everywhere. Thus, it may punish for violation of treaty stipulations by its citizens abroad, for offenses committed in foreign countries where, by treaty, jurisdiction is conceded for that purpose, as in some cases in China and in the Barbary states; it may provide for offenses committed on deserted islands, and on an uninhabited coast, by the officers and seamen of vessels sailing under its flag. It may also punish derelictions of duty by its ministers, consuls, and other representatives abroad. But in all such cases it will be found that the law of congress indicates clearly the extritorial character of the act at which punishment is aimed. Except in cases like these, the criminal jurisdiction of the United States is necessarily limited to their own territory, actual or constructive. Their actual territory is co-extensive with their possessions, including a marine league from their shores into the sea.

This limitation of a marine league was adopted because it was formerly supposed that a cannon-shot would only reach to that extent. It is essential that the absolute domain of a country should extend into the sea so far as necessary for the protection of its inhabitants against injury from combating belligerents while the country itself is neutral. Since the great improvement of modern times in ordnance, the distance of a marine league, which is a little short of three English miles, may, perhaps, have to be extended so as to equal the reach of the projecting power of modern artillery. The constructive territory of the United States embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subjected to punishment. But when a vessel is destroyed and goes to

the bottom, the jurisdiction of the country over it necessarily ends, as much so as it would over an island which should sink into the sea.

In this case it appears that the *Golden Gate* was broken up; not a vestige of the vessel remained. Whatever was afterwards done with reference to property once on board of her, which had disappeared under the sea, was done out of the jurisdiction of the United States as completely as though the steamer had never existed.

We are of opinion, therefore, that the circuit court has no jurisdiction to try the offense charged, even if, under the facts admitted by the parties, any offense was committed. According to the stipulation, judgment sustaining the demurrer will be, therefore, entered and the defendants discharged.

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ABANDONED PROPERTY.

1. **THEFT OF ABANDONED PROPERTY—ACT 1825, SECTION 9, CONSTRUED.**—The ninth section of the act of congress of March 3, 1825, against plundering or stealing money, goods, merchandise, or other effects, from or belonging to any ship or vessel, in distress or wrecked, lost or stranded, does not apply to property which has been abandoned by its owners. Property thus abandoned may be acquired by any one who has the energy and enterprise to seek its recovery, without violating the statute. *United States v. Smiley*, 840.
2. **EXTRATERRITORIAL CRIMINAL JURISDICTION.**—The criminal jurisdiction of the United States may, in some instances, extend to their citizens beyond their territory, as, for instance, for violation of treaty stipulations by them abroad; for offenses committed in foreign countries where jurisdiction is by treaty conceded for that purpose, as in some cases in China and the Barbary States; for offenses committed on deserted islands or uninhabited coasts; by officers and seamen of vessels sailing under their flag; and for derelictions of duty by their ministers, consuls, and other representatives abroad. But except in cases like these (and their extra-territorial character is generally indicated in the law designating the act for which punishment is prescribed), the criminal jurisdiction of the United States is limited to their own territory, actual or constructive. Their actual territory is co-extensive with their possessions, including a marine league from their shores on the sea. Their constructive territory embraces vessels sailing under their flag. Wherever they go they carry the laws of their country, and for a violation of them their officers and seamen may be subjected to punishment. *Id.*
3. **JURISDICTION OF PROPERTY BURIED IN SEA NEAR COAST.**—In this case the vessel, which carried the money recovered by the accused, was at the time of its recovery broken up, without a vestige of it remaining. The money was buried in the sand, several feet under the water of the sea, and was within one hundred and fifty feet of the Mexican shore: *Held*, that there was no jurisdiction of the United States over the place or property; and that the jurisdiction of Mexico over all offenses committed within a marine league of its shores, not on a vessel of another nation, was complete and exclusive. *Id.*

ACCOUNT STATED.

1. **ACCOUNT STATED—BROKER'S PASS-BOOK.**—Under the circumstances of this case, the balances struck in a "broker's pass-book:" *Held*, accounts stated. *Marye v. Strouse*, 204.

2. INTEREST—ACCOUNT STATED.—An account stated is a new promise, and not a promise to pay any particular item that went into it. *Id.*

ADMIRALTY.

1. SALVOR, UNDERTAKING OF.—A salvor does not undertake to succeed in saving the property in peril, but only that he will exercise ordinary skill and diligence in the use of the means or machinery with which he undertakes the salvage service. *The Allegiance*, 68.
2. DUTY OF THE TOW.—It is the duty of the vessel in tow to keep in proper trim and tack, to follow the tug and steer accordingly, and if injury results to the tow from negligence or mistake in these respects, the tug is not responsible. *Id.*
3. SALVAGE BY A STEAM TUG—COMPENSATION FOR.—Owing to its comparative independence of the winds and currents, a steam tug may perform a salvage service with comparative safety to herself, and therefore the matter of risk to herself and crew is to be estimated accordingly, in fixing the value of such service. *Id.*
4. SALVAGE SERVICE—COMPENSATION FOR.—A steam tug of three hundred and four horse-power left Baker's bay, and overtook an iron ship of one thousand two hundred and thirty-five tons, worth forty-seven thousand dollars, drawing twelve feet of water, in ballast, drifting on to the west end of Chinook spit in seventeen feet of water at flood tide, near two hours before high water, with the wind blowing about eight from the south-south-east, and took her hawser and towed her under the lee of the east end of Sand island, where, owing to the strength of the wind, which had increased to ten and veered to south-east by south, she was compelled to let her go in comparatively safe anchorage in twenty-three feet of water; but the ship, only letting go one anchor, dragged on to the spit, where she lay until next morning in about four or five feet of water at low tide, when the tug, and three others of near the same power and working under the same management, returned to her and pulled her off about two hours before high water, with a light breeze from the east by south, and the ship heading south by east, without any serious risk to the tugs, or actual injury thereto: *Held*, that the service was a salvage service, and the compensation therefor fixed at five thousand dollars. *Id.*
5. COLLISION.—Steamer adjudged in fault for not keeping out of the way of a schooner seen to be approaching her nearly bows on, at the distance of a mile and a half. *Steamer Ancon*, 118.
6. LOOKOUT.—The duty of unremitting attention on the part of a lookout enforced. *Id.*
7. IF THE NIGHT WAS FOGGY, as claimed by the libelants, the steamer should have blown her whistle and moderated her speed, both of which precautions she neglected until too late. *Id.*
8. IF SUFFICIENTLY CLEAR to permit an approaching vessel to be seen at the distance of a mile and a half, her negligence in not keeping out of the way was inexcusable, if not unaccountable. *Id.*
9. CHANGING COURSE, FAMILIAR EXCUSE.—The familiar excuse set up by the steamer, that the schooner changed her course and ran across her bows, rejected as not supported by the testimony; and because, if it did occur,

- as stated by the steamer's second officer and lookout, the steamer had ample time to avoid the disaster. *Id.*
10. CARRIER'S LIABILITY—GOODS DAMAGED BY SEA PERILS.—Where wool arrived damaged, and in a perishing condition, from causes for which the carrier was not responsible, and the consignees declined to receive it, and it was subsequently sold by the carrier to prevent its perishing on his hands: *Held*, that the carrier's duty and liability terminated on the discharge of the wool, and reasonable notice and opportunity given to the consignees to take it away. He thenceforth became a compulsory bailee of the goods, bound only to such reasonable care as a prudent and honest man would take of property of which he has become the involuntary custodian. *The Bobolink*, 146.
 11. DEATH, ACTION FOR.—Although an action may not lie at common law to recover damages for the death of a person, it will at the civil law, and therefore *seem* that it will in admiralty. *Holmes v. O. & Cal. R. Co.*, 262.
 12. MARINE TORT.—A marine tort is one that occurs on any public navigable water of the United States, whether caused by a wrongful act or omission, and the proper district court, as a court of admiralty, has jurisdiction of a suit to recover damages therefor. *Id.*
 13. RIGHT GIVEN BY STATE STATUTE.—The jurisdiction of the national courts does not depend upon the origin of the rights of the parties; and where a state statute gives a right, the same may be asserted or enforced in such courts whenever the citizenship of the parties or the nature of the subject will permit. *Id.*
 14. SAME.—The right given by section 367 of the Or. Civ. Code, to an administrator to recover damages on account of the death of his intestate from the party by whose act or omission such death was caused, may be enforced in the national courts. *Id.*
 15. SAME—SUIT IN ADMIRALTY.—When a passenger on the railway ferry-boat plying across the Wallamet river between East Portland and Portland was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the district court by the administrator of the deceased, to recover the damages given therefor by section 367, *supra*. *Id.*
 16. SEAMAN'S WAGES—DISRATING COOK.—When a cook was put off duty in consequence of persistent negligence, disobedience, and insolence: *Held*, that he had no right to recover wages for the period during which he performed no duty. *Bark Antioch*, 328.
 17. PAYMENT ALLOWED OUT OF SURPLUS PROCEEDS in the registry of a claim, which, by the law of this state, constituted a lien on the vessel. *Mary Zephyr*, 427.
 18. CRANE-LINE.—The primary purpose of a crane-line is to steady the back-stays, and in blustery weather it is very apt to chafe and wear out where it is fastened to the stays; and, therefore, it ought not to be used as a foot-rope without caution and the aid of the stays. *Chandos*, 544.
 19. SAME.—The weather being wet, the night dark, and the wind strong, the libellant was ordered to go aloft and cast off the stop on the foretop-gallant halyards, which he did by going up the rigging and out on the crane-line to the space between the topmast and top-gallant-stay, and

- there untying the stop with both hands while he sat upon the crane-line, without any other hold or security, and, just as the stop was cast off, the line parted near the top-gallant-stay, and the libelant was precipitated to the deck and seriously injured: *Held*, that the injury was caused by the negligence of the libelant in going on the crane-line without an opportunity of examining its condition and without holding to the stays by his arms or legs, or both, while casting off the stop; and that if, by reason of the negligence or misconduct of the mate, the crane-line was insufficient, still the libelant could not recover damages for the injury, because even then his own negligence substantially contributed to the result. *Id.*
20. FELLOW-SERVANT.—*Semble*, that the mate is not the fellow-servant of a sailor so as to exempt the master from liability for an injury caused to the latter by the negligence of the former. *Id.*
21. DEVIATION.—A departure from the due course of a voyage, to save property merely, is a deviation and will forfeit the insurance; but a departure to save life is not. But although the law will, as between the insurer and insured, excuse a departure from motives of humanity, a master is not correspondingly bound to make such departure, even to save the life of one of the crew; but the time and risk likely to be consumed and incurred in such departure, as compared with that incident to the direct voyage, are to be considered, and have a controlling influence in the matter. *Id.*
22. SAME.—On June 10, in latitude 38° south and longitude 91° west, the ship *Chandos* was on her way to Portland, Oregon, with a cargo of railway iron, without a surgeon or any surgical appliances on board, when the libelant fell from aloft and broke his thigh bone: *Held*, that if the ship could have made a port—as, for instance, Valparaiso, distant about 1,080 miles—in five or six days, it would have been the duty of the master to have gone there and obtained surgical aid for the libelant; but if it could not have been done in less than two weeks, he was not bound to make the departure. *Id.*
23. SICK OR INJURED SEAMEN.—The hospital service of the United States is not intended to supersede the marine law, which imposes an obligation on a vessel to take care of a seaman falling sick or becoming injured in its service, but only auxiliary thereto. *Id.*
24. SAME.—A seaman injured in the service of a vessel, without his fault, is entitled to be taken care of, at the expense of the vessel, until the end of the voyage, and longer, if necessary to effect a cure, so far as the same can be done by the use of the ordinary medical means; and the fault which will exempt a vessel from such liability is not mere ordinary negligence consistent with good faith, but some positively vicious conduct, such as gross negligence or willful disobedience of orders. *Id.*
25. NEGLECT TO SEND SEAMAN TO HOSPITAL.—Damages allowed for neglecting to send libelant to the marine hospital at Portland, at the expense of the ship, for twelve days after her arrival in the Columbia river. *Id.*

ADMINISTRATOR.

1. ADMINISTRATION—JURISDICTION TO GRANT.—By the constitution of this state, the county court is a court of record with general jurisdiction of probate matters, to be regulated by law (art. 7, secs. 1 and 12); and by

statute (Civ. Code, sec. 869) it has the exclusive power to grant letters of administration upon the estate of a person who at or immediately before his death was an inhabitant of the county: *Held*, 1. That a decree of the county court of Multnomah county, granting letters to D. upon the estate of P., by which it appears to have been adjudged by said court upon a proper petition, that P. was an inhabitant of the county at or immediately before his death, cannot be questioned collaterally on the ground that P. was not in fact such inhabitant; 2. That said court having general jurisdiction of the subject-matter—the granting of administration upon the vacant estate of a deceased person—it had the authority to inquire and determine whether, in that particular case, the deceased was an inhabitant of the county or not, and that its decision upon the question is conclusive, except upon appeal; and 3. That a subsequent decree by the county court of another county granting letters of administration upon the same estate to H., while the first was in full force and effect, is null and void. *Holmes v. O. & C. R. Co.*, 262.

2. **INHABITANT.**—The word "inhabitant," as used in the section 1053 aforesaid, has a narrower and more limited signification than domicile, and implies a personal presence in the county as a dweller therein. *Id.*
3. **DAMAGES.**—The damages recoverable under section 367 of the Or. Civ. Code, by an administrator for the death of his intestate, are general assets of the estate, and are given merely as a pecuniary compensation for the death, and not as a *solatium*; nor are they to be exemplary or vindictive; but according to the value of the life, having due regard to the capacity and disposition of the deceased to be useful—to labor and to save. *Id.*

ADVERSE POSSESSION.

See **LIMITATIONS OF ACTIONS**, 6, 8.

AGENT.

1. **AGENT.**—An agent to buy cannot be the seller. *Marye v. Strouse*, 204.
2. **BROKER'S CONTRACT.**—An ordinary broker's contract for the purchase of mining stock, each share of which has an independent value, is not an entire contract. *Id.*
3. **SAME—CUSTOM.**—A custom of charging customers an arbitrary sum for telegrams, usually much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should appear that both parties knew of it. *Id.*
4. **ACCOUNT STATED—BROKER'S PASS-BOOK.**—Under the circumstances of this case, the balances struck in a "broker's pass-book:" *Held*, accounts stated. *Id.*
5. **SAME—INTEREST—APPROPRIATION.**—Where a statute does no more than prohibit a recovery of interest in excess of ten per cent., when the contract is not in writing, but does not otherwise make the rate of interest unlawful, interest in excess of that rate may be included in an account stated; and money paid on account by the debtor may be applied to the payment of such interest by the creditor in the absence of any appropriation by the debtor. *Id.*
6. **MOTION—APPEARANCE.**—A general appearance and consenting to a continuance is a waiver of irregularity in the notice. *Id.*

7. INTEREST—ACCOUNT STATED.—An account stated is a new promise, and not a promise to pay any particular item that went into it. *Id.*

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AMENDMENT AND AMENDMENT OF RETURN.

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ARREST.

1. ARREST IN CIVIL ACTION—DISCHARGE FROM.—The arrest before judgment in civil actions being allowed to the end that the plaintiff may take the body of defendant in execution in case the judgment is not satisfied; and the statute of Oregon having prescribed that a judgment debtor confined upon execution may be finally discharged from imprisonment upon the surrender of his property: *Semble*, that the defendant is entitled to be discharged from arrest unless the plaintiff charges him in execution within what may be considered a reasonable time after judgment; and this although there is no statute which in terms or effect directs or provides for such discharge. *United States v. Griswold*, 255.
2. SAME—RULE AT COMMON LAW.—Prior to the revolution, in the court of king's bench, the rule was that a "defendant prisoner" against whom a judgment was given, and who was not charged in execution thereof within two terms thereafter, might be discharged from custody; and the statute of Oregon being silent on the subject, the court assumes that such rule is applicable to the case as a part of the common law in force in this state, and will grant or refuse an application for a supersedeas and discharge by a judgment debtor accordingly. *Id.*
3. MALICIOUS ARREST.—The defendant caused the arrest of the plaintiff without probable cause, but not from any actual ill-will towards him or any specific desire to vex or annoy him, but for the purpose of finding out who had forged a certain note in his name, then in the plaintiff's possession, and which he had claimed to be valid and to have acquired in good faith: *Held*, that the arrest was malicious, because the defendant had no right to experiment in that way with the liberty and good name of the plaintiff; that the act was purposely wrong and unlawful and therefore malicious. *Johnson v. Ebberts*, 538.

ASSAULT.

See CRIMINAL LAW, 16.

ASSESSMENTS.

See SWAMP LANDS.

ASSETS.

See ADMINISTRATOR, 3.

ASSIGNEE.

1. ASSIGNEE—BANKRUPT ACT, SECTION 739, R. S.—While an assignee who has been appointed by a court of bankruptcy of another district may sue in

this court to recover assets from a stranger, such action must be by a plenary suit, and there is nothing in the bankrupt act which takes such a suit out of the provisions of section 739 of the R. S., although the defendant may have property in this district which is claimed to be assets; and the defendant must be an inhabitant of, or be found within this district at the time of serving the writ, to give this court jurisdiction. *Shainwald v. Lewis*, 585.

2. SECTION 738, R. S., CONSTRUED.—This section does not refer to a suit like the present, in which the plaintiff seeks, through a receiver, to apply the general property of a defendant to the payment of his debts, but to suits in equity, to enforce some pre-existing lien or claim upon a specific piece of property. *Id.*

ASSIGNMENTS.

1. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.—Assignments for the benefit of creditors are governed in this state by the provisions of title III., part II. of the Civ. Code, and not by those of the Insolvent Act of 1852. *In re Temple*, 77.

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ATTORNEY AND ATTORNEY'S FEES.

1. STIPULATION FOR ATTORNEY'S FEE.—A stipulation to pay a reasonable attorney's fee to the plaintiff in case a promissory note or other contract is not performed according to its terms, and the party entitled to demand such performance is compelled to enforce it by law, is just and valid. *Wilson S. M. Co. v. Moreno*, 35.
2. ATTORNEY'S FEE.—A stipulation by the maker of a negotiable instrument for the payment to the holder thereof of an attorney's fee in case the same is not paid without action is a valid promise, and passes with the instrument to each and every holder thereof; and each subsequent party to such instrument becomes thereby responsible in like manner for such fee to each and every subsequent holder thereof. *Bank Brit. N. A. v. Ellis*, 96.

BANKRUPTCY.

1. OBJECTIONS TO DISCHARGE.—Various objections to a discharge considered and overruled. *In re Scott*, 234.
2. VOID SALE—CHANGE OF POSSESSION.—A sale which was objected to as void against creditors under the laws of this state, because not accompanied by an actual, immediate, and continued change of possession, sustained in a suit by an assignee in bankruptcy on the authority of *Stewart v. Platt*, 101 U. S. 731. *Lloyd v. Foley*, 424.
3. LIEN OF A JUDGMENT.—E. conveyed certain property in fraud of his creditors, and afterwards certain creditors of the firm of E. & C. obtained judgments against said firm and docketed the same; then the firm and members thereof were adjudged bankrupts, and the assignee brought suit against the grantee in the fraudulent conveyance to have the same set aside and obtained a decree to that effect, whereupon the property was sold by the assignee, free from the liens of such judgments, if any, and the proceeds brought into this court for distribution: *Held*, 1. That the lien of such judgments only attached to the property then belonging to the judgment debtor; 2. That the conveyance passed all the estate of

the grantor in the premises to the grantee, qualified only by the right of the creditors to subject the same to the payment of their debts, in the manner and time prescribed by law; and, 3. That therefore the lien of the judgments did not attach to the premises, and the proceeds of the sale thereof are the separate estate of E., and must be first equally applied to the payment of his separate creditors. *In re Estes*, 459.

4. FRAUD—CONSPIRACY—COLLUSIVE JUDGMENT—FICTITIOUS INDEBTEDNESS—FABRICATED ANTEDATED NOTES.—Where members of an insolvent firm, with intent to defraud firm creditors, conspired with a person to whom the firm was indebted in only a small amount to have an attachment levied on the firm property, and a judgment to be taken upon fictitious and antedated firm notes fabricated for the purpose, and to transfer to him all the firm property then *in transitu*, and for which the firm held bills of lading; and, in pursuance of such conspiracy, judgment was recovered, the firm property sold on execution and bid in by the plaintiff in the collusive suit, and the remaining property of the firm secretly transferred to him: *Held*, that he was liable to the assignees in bankruptcy, as representative of the firm creditors, for the value of all of the firm property so fraudulently obtained by him, and will be decreed a trustee of such property and of its proceeds for the benefit of the firm creditors represented by the assignee. *Shainwald v. Lewis*, 556.
5. ASSIGNEE—BANKRUPT ACT, SECTION 739, R. S.—While an assignee who has been appointed by a court of bankruptcy of another district may sue in this court to recover assets from a stranger, such action must be by a plenary suit, and there is nothing in the bankrupt act which takes such a suit out of the provisions of section 739 of the R. S., although the defendant may have property in this district which is claimed to be assets; and the defendant must be an inhabitant of, or be found within this district at the time of serving the writ, to give this court jurisdiction. *Shainwald v. Lewis*, 585.
6. SECTION 738, R. S., CONSTRUED.—This section does not refer to a suit like the present, in which the plaintiff seeks, through a receiver, to apply the general property of a defendant to the payment of his debts, but to suits in equity, to enforce some pre-existing lien or claim upon a specific piece of property. *Id.*

See INSOLVENCY.

BILLS AND NOTES.

See PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

BILLS OF EXCEPTIONS.

See EXCEPTIONS.

BONDS.

See OFFICIAL BONDS.

BROKER.

1. AGENT.—An agent to buy can not be the seller. *Marye v. Strouse*, 204.
2. BROKER'S CONTRACT.—An ordinary broker's contract for the purchase of mining stock, each share of which has an independent value, is not an entire contract. *Id.*

BURDEN OF PROOF.

1. CONTRIBUTORY NEGLIGENCE.—This matter is a defense, and the burden of proof is upon the defendant to establish it; and drunkenness is not *per se* such negligence, but only more or less evidence of it, according to the circumstances. *Holmes v. O. & Cal. R. Co.*, 262.

CHINESE.

See CONSTITUTIONAL LAW; HABEAS CORPUS; TREATY.

CITIZEN.

1. ALIEN WOMAN—MARRIAGE OF, TO A CITIZEN.—Under section 2 of the act of February 10, 1875 (sec. 1994, R. S.), an alien woman of the race or class of persons that are entitled to be naturalized under existing laws, who is married to a citizen of the United States, becomes by that act a citizen of the United States; and such admission to citizenship has the same force and effect as if such woman had been naturalized by the judgment of a competent court. *Leonard v. Grant*, 603.
2. SAME.—The clause in the statute aforesaid, "might herself be lawfully naturalized," does not require that the woman shall have the qualifications of residence, good character, etc., as in case of admission to citizenship in a judicial proceeding, but it is sufficient if she is of the class or race of persons who may be naturalized under existing laws. *Id.*

See INDIAN AND INDIAN COUNTRY.

CITIZENSHIP, PROOF OF.

1. MINING CLAIM—PROOF OF CITIZENSHIP.—On the trial of the right to a mining claim under chapter 6 of the R. S. of the United States, the affidavit of the party is made admissible in evidence by the provisions of section 2321, to prove the citizenship of a locator of the claim. *North Noonday M. Co. v. Orient M. Co.*, 503.

COLLISION.

See ADMIRALTY.

COLLUSION.

See BANKRUPTCY.

COMMON CARRIER.

1. CARRIER'S LIABILITY—GOODS DAMAGED BY SEA PERILS.—Where wool arrived damaged, and in a perishing condition, from causes for which the carrier was not responsible, and the consignees declined to receive it, and it was subsequently sold by the carrier to prevent its perishing on his hands: *Held*, that the carrier's duty and liability terminated on the discharge of the wool, and reasonable notice and opportunity given to the consignees to take it away. He thenceforth became a compulsory bailee of the goods, bound only to such reasonable care as a prudent and honest man would take of property of which he has become the involuntary custodian. *The Bobolink*, 146.

2. **COMMON CARRIER.**—A common carrier of passengers for hire is bound to provide for their safety so far as is practicable by the exercise of human care and foresight, and where one is drowned under the circumstances aforesaid, drunkenness, if it existed, was not contributory negligence. *Holmes v. O. & Cal. R. Co.*, 262.
3. **DAMAGES.**—The damages recoverable under section 367 of the Or. Civ. Code, by an administrator for the death of his intestate, are general assets of the estate, and are given merely as a pecuniary compensation for the death, and not as a *solatium*; nor are they to be exemplary or vindictive; but according to the value of the life, having due regard to the capacity and disposition of the deceased to be useful—to labor and to save. *Id.*
4. **NEGLIGENCE.**—The defendant's steam ferry crossed the Wallamet river to Portland on a dark night with passengers from its railway, and P., in stepping from the boat to the pontoon at the landing, stumbled and fell into the river, and was drowned: *Held*, that the want of a guard to prevent the passengers from attempting to go ashore before the landing was safely made, and some sufficient signal to warn passengers when it was proper to go ashore, and particularly the want of sufficient light upon the boat and pontoon to enable passengers to readily observe the same and their relative situation, was negligence, and caused the death of P. *Id.*

CONSPIRACY.

1. **CONSPIRACY.**—It is an offense, under the laws of the United States, for two or more persons to conspire to commit any offense against the United States. *U. S. v. Doyle*, 612.
2. **CONSPIRACY—WHO LIABLE.**—If two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy are liable to the penalty imposed. *Id.*
3. **DEFINITION OF CONSPIRACY.**—A conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose. *Id.*
4. **THE EVIDENCE IN PROOF OF A CONSPIRACY** will, generally, from the nature of the case, be circumstantial, though the common design is the essence of the charge. It is not necessary to prove by direct evidence that the defendants actually came together and agreed in terms to have that design, and to pursue it by common means. If the acts of the parties and all the circumstances are such as to justify the conclusion that they are by preconcert pursuing the unlawful object, it will be sufficient. *Id.*

See **BANKRUPTCY**, 4; **CRIMINAL LAW**, 21, 22.

CONSTITUTIONAL LAW.

1. **AMENDMENT OF STATUTE.**—*Seem* that under section 22 of article IV of the constitution of the state of Oregon, a section of a statute cannot be amended by simply repealing a clause or subdivision of it, and that therefore subdivision 5 of section 6 of the Or. Civ. Code, in which six years are given to bring this action, is still in force notwithstanding the attempt to repeal the same by the act of October 22, 1870. (Ses. L. 34.) *Sayles v. O. C. R. Co.*, 31.

2. **IMPORTS—CONSTITUTION.**—The word "imports," as used in that clause of the constitution of the United States which says that "no state shall levy any imposts or duties on imports or exports," does not apply to articles carried from one state into another, but only to articles imported from foreign countries. *In re Rudolph*, 295.
3. **DRUMMER'S LICENSE.**—A state statute which imposes a license tax upon all traveling merchants, agents, etc., who travel in the state of Nevada and sell, or offer to sell, goods by sample or otherwise, to be delivered at a future time, without any discrimination against the goods or products of other states, does not violate the provisions of the constitution of the United States forbidding the levying of imposts, or duties on imports, or conferring upon congress the power to regulate commerce between the states, with respect to goods sold by such traveling agents or drummers, for their employers doing business in California, to be shipped at a future day to the purchaser. *Id.*
4. **SAME—HABEAS CORPUS.**—A party arrested for the offense of selling goods in Nevada for his employers in California, without a license, in violation of a statute which makes no discrimination against goods brought from another state, is not restrained of his liberty in violation of the constitution or laws of the United States. *Id.*
5. **THIS INHIBITION OF THE FOURTEENTH AMENDMENT UPON A STATE** applies to all the instrumentalities and agencies employed in the administration of its governments; to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. *Parrott's case*, 349.
6. **POWER OVER CORPORATIONS.**—Where state legislation, under the state's reserved power to alter and repeal charters of corporations, comes in conflict with valid treaty stipulations, and with the constitution of the United States, it is void. *Id.*
7. **SAME.**—Where the policy of state legislation, under the reserved power of the state to alter or repeal charters of corporations, does not have in view the relations of the corporations to the state as the object to be effected, but seeks to reach the Chinese, and exclude them from a large field of labor, the ultimate object being to drive them from the state, in violation of their rights under the constitution and treaty stipulations—the discriminating legislation being only the means by which the end is to be attained—the end sought is a violation of the constitution and treaty, and the legislation as such is void. *Id.*
8. **UNLAWFUL OBJECT.**—Where the object sought is unlawful, it is unlawful to use any means to accomplish the object. *Id.*
9. **UNCONSTITUTIONAL ACT.**—That which cannot be constitutionally done directly, cannot be done indirectly. *Id.*
10. **SECTION 31, ARTICLE IV OF THE CONSTITUTION OF CALIFORNIA**, which provides that all general laws passed for the formation of private corporations may be altered from time to time, or repealed, does not authorize the legislature to forbid the employment by corporations of persons of a particular class or nationality. *Id.*
11. **CONSEQUENCES OF A PERSISTENT VIOLATION OF TREATIES BY A STATE DISCUSSED**, and attention called to the stringent criminal laws passed by congress to enforce the fourteenth amendment. *Id.*

12. IMPRISONMENT.—The national courts have jurisdiction to relieve any person from imprisonment, under color of the authority of a state without due process of law, contrary to the fourteenth amendment. *In re AA Lee*, 410.
13. DUE PROCESS OF LAW.—A person imprisoned under a valid law, although there is error in the proceeding resulting in the commitment, is not imprisoned without due process of law, contrary to the fourteenth amendment. *Id.*
14. DE FACTO OFFICER.—A person in office by color of right is an officer *de facto*, and his acts, as such, are valid and binding as to third persons; and an unconstitutional act is sufficient to give such color to an appointment to office thereunder. *Id.*
15. SAME.—The constitution of Oregon authorizes the legislature, when the population of the state equals two hundred thousand, to provide by election for separate judges of the supreme and circuit courts. On October 17, 1878, the legislature passed an act providing for the election of such judges at the general election in June, 1880, and also that the governor should appoint such judges in the mean time, which was done: *Held*, that admitting such act was unconstitutional, because the population of the state was less than two hundred thousand, and that the appointments by the governor were therefore invalid, and also because the constitution only authorized the selection of such judges by election, still the persons so appointed under the act, and performing the duties of the judges of said courts, were judges *de facto*, and a person imprisoned under a judgment given in one of them, convicting him of a crime, is not thereby deprived of his liberty without due process of law, contrary to the fourteenth amendment. *Id.*
16. CONSTITUTION—DISINTERMENT OF CHINESE.—The statute of California, making it an offense to disinter or remove from the place of burial the remains of any deceased person without a permit, for which a fee of ten dollars must be paid, does not violate subdivision 3 of section 2, article I of the constitution of the United States, providing that "congress shall have power to regulate commerce with foreign nations." *In re Wong Yung Quy*, 442.
17. SAME.—Nor does it violate subdivision 2 of section 10, article I, providing that "no state shall, without the consent of congress, lay any impost or duties on * * * exports." *Id.*
18. SAME.—Nor is it in conflict with the fourteenth amendment, which prohibits any state from denying to "any person within its jurisdiction the equal protection of the laws." *Id.*
19. SAME—TREATY WITH CHINA.—Nor does it violate the fourth article of the treaty with China, called the Burlingame treaty, which provides that "Chinese subjects in the United States shall enjoy entire liberty of conscience, and shall be exempt from all disability or persecution on account of their religious faith or worship." (16 Stat. 740.) *Id.*
20. SAME.—The act is a sanitary measure within the police powers of the state, and as such is valid. *Id.*
21. A CORPSE IS NOT PROPERTY, and the remains of human beings carried out of the state for burial in a foreign country are not exports within the meaning of the clause of the national constitution prohibiting the laying of imposts or duties by the state upon exports. *Id.*

22. CHINESE TREATY—CONSTITUTION.—The statute of California, prohibiting all aliens incapable of becoming electors of the state from fishing in the waters of the state, violates the fourteenth amendment of the constitution of the United States, also articles V and VI of the treaty with China, and is void. *In re Ah Chong*, 451.
 23. DUE PROCESS OF LAW.—Whenever, by the laws of the state, a tax or assessment is imposed upon property for public uses, whether for the whole state, or a limited portion of it, and those laws provide a mode of contesting the charge thus imposed by suit in the ordinary courts of the state, with notice to the person, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law. *Id.*
 24. SAME.—The statute of California authorizing the reclamation of swamp lands, and the assessment of the expenses upon the lands benefited, and collection thereof by a civil suit in the ordinary courts of the state to enforce the lien against the land, does not violate that provision of the national constitution providing that no state shall "deprive any person of * * * property without due process of law." *Reclamation District v. Hagar*, 567.
 25. UNEQUAL ASSESSMENTS NOT NECESSARILY VOID.—The reclamation statute of California seems to require the assessment to be made proportionate to the benefits which will result from the work; but if not strictly so made, it violates no provision of the constitution of the United States, or of the state of California. *Id.*
 26. STATE STATUTES—AUTHORITATIVE CONSTRUCTION.—The construction by the highest court of a state of a state constitution, or statute, which does not trench upon any of the powers of the national government, or upon any right protected by the constitution of the United States, is authoritative and conclusive in the national courts. *Id.*
 27. IMPAIRING OBLIGATION OF CONTRACT.—The statute of California providing for the reclamation of swamp lands impairs no contracts between the United States and the state of California, nor of the state of California and purchasers of swamp lands, nor any contracts of owners of lands held under Mexican grants, or other patents from the United States, nor of any contract found in the charter or by-laws of Reclamation District No. 108. *Id.*
 28. COIN ASSESSMENT—OBLIGATION OF CONTRACT.—Authorizing the assessment to be collected in coin, where the indebtedness of the reclamation district for reclaiming the land might be paid in other lawful money, does not impair the obligation of a contract. *Id.*
 29. UNCONSTITUTIONAL STATUTE VOID.—A statute of a state creating an offense passed in violation of the constitution of the United States, or of a treaty with a foreign nation, is void, and a judgment convicting a party of the offense created by said void statute is also void, and not merely erroneous and voidable. *In re Wong Yung Quy*, 237.
- See HABEAS CORPUS; SOUTHERN PACIFIC RAILROAD, 9-20; TREATY.

CONTRACT.

1. CONSTRUCTION OF A CONTRACT.—H. and L. agreed to pay M. and C. one thousand eight hundred dollars for five years for certain rooms in a build-

- ing to be erected by the latter, and also to make, execute, and deliver to them a good and sufficient bond "to their satisfaction," in the sum of two thousand dollars, conditioned for the payment of such rent: *Held*, 1. That M. and C. had a right to require a bond which was sufficient to secure the payment of the rent beyond a reasonable doubt; 2. That if M. and C., acting in good faith upon the best information conveniently within their reach, rejected a bond tendered by H. and L. as insufficient, the latter are bound by their action; and, 3. That the circumstances considered, the contract should be construed as requiring a bond executed by other persons than H. and L. *Harris v. Miller*, 319.
2. **VENDOR'S LIEN.**—Upon the sale of real property on credit, without collateral security, the vendor has a lien upon the same for the unpaid purchase money, unless it was waived by the express agreement of the parties; and such lien exists and may be enforced against all persons claiming under the vendee with notice that the purchase money is unpaid. *Coos Bay W. R. v. Crocker*, 574.
3. **ASSIGNMENT.**—The assignment and acceptance of a contract for the sale of real property does not make the assignee personally liable for the purchase money due thereon; and as against him the vendor's remedy is confined to the enforcement of his lien on the property. *Id.*
4. **CONTRACT—ENTIRE OR SEVERABLE.**—Whether a contract is entire or severable depends upon the intention of the parties, to be gathered from the circumstances of the case. *Id.*
5. **SAME.**—A contract to sell ninety-six thousand acres of wild land, of different grades and values, lying substantially in a body, at an average price of one dollar per acre, to be conveyed and paid for as and when the same is surveyed and patented to the grantee by the United States, is not as many distinct contracts as there may be conveyances and payments in pursuance thereof, but only one entire contract, and therefore the vendor's lien for any portion of the purchase money thereof remaining unpaid extends to and may be enforced against the whole tract. *Id.*

See ACCOUNT STATED.

CORPORATION AND CORPORATE POWERS.

See CONSTITUTIONAL LAW; SOUTHERN PACIFIC RAILROAD, 7-20; TREATY.

COUNTY.

1. **COUNTY.**—A county in Oregon is a body politic, and may, in the exercise of the powers given it by statute, take a note or bond and mortgage, and enforce the same by the ordinary legal proceedings in the courts. *Alexander v. Knox*, 54.
2. **SCHOOL FUNDS.**—In 1858, the only fund which a county treasurer was authorized by law to loan, was the common school fund in his custody, arising from the sale of sections 16 and 36, and in doing this he was the agent of the territory—the trustee of the fund—and not the county, and a suit to enforce the obligation of such note and mortgage should have been brought in the name of such treasurer. *Id.*
3. **PLAINTIFF.**—A suit brought in the name of a plaintiff who is neither a natural nor an artificial person is a nullity, and therefore a suit by the "board of county commissioners of Lane county," in 1863, to enforce

a note and mortgage given to the treasurer of that county upon a loan of school funds, was a nullity, and could not support a decree for any relief. *Id.*

COUNTY COURT OF OREGON.

See ADMINISTRATOR.

CREDITORS.

See ASSIGNMENTS.

CRIMINAL LAW.

1. INTENT.—Where the statute contains nothing requiring acts to be done knowingly, and the acts are not *malum in se*, nor infamous, but only wrong because prohibited, a criminal intent need not be proved. The offender is bound to know the law, and obey it, at his peril. *U. S. v. Leathers*, 17.
2. SECTION 2147, R. S., TITLE "INDIANS," CONSTRUED.—The president having set apart the Pyramid Lake reservation for the use of Indians, the whites who go upon the reservation to fish, do so "contrary to law," within that section. *U. S. v. Sturgeon*, 29.
3. ATTEMPT TO COMMIT MURDER.—There is no law of the United States for the punishment of the crime of an attempt to commit murder upon land, in places within the exclusive jurisdiction thereof, unless committed by some means other than an assault with a dangerous weapon, as by poison, drowning, or the like. *U. S. v. Williams*, 244.
4. DANGEROUS WEAPON.—A dangerous weapon is one likely to produce death or great bodily harm; and a loaded pistol is such a weapon within the knowledge of the court. *Id.*
5. SAME.—When it is practicable for the court to declare a particular weapon a dangerous one or not, it is the duty of the court to do so; but otherwise it is a question of law and fact, to be determined by the jury under the direction of the court. *Id.*
6. CONSPIRACY.—It is an offense, under the laws of the United States, for two or more persons to conspire to commit any offense against the United States. *U. S. v. Doyle*, 612.
7. CONSPIRACY—WHO LIABLE.—If two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy are liable to the penalty imposed. *Id.*
8. DEFINITION OF CONSPIRACY.—A conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose. *Id.*
9. THE EVIDENCE IN PROOF OF A CONSPIRACY will, generally, from the nature of the case, be circumstantial, though the common design is the essence of the charge. It is not necessary to prove by direct evidence that the defendants actually came together and agreed in terms to have that design, and to pursue it by common means. If the acts of the parties and all the circumstances are such as to justify the conclusion that they are by preconcert pursuing the unlawful object, it will be sufficient. *Id.*
10. RESISTING MARSHAL.—It is an offense against the United States to obstruct, resist, or oppose the United States marshal while executing, or

attempting to execute, any lawful writ, process, or order placed in his hands for execution. *Id.*

11. **FUNCTIONS OF THE JURY.**—On the trial of an indictment for resisting the United States marshal in executing a writ of restitution, issued upon a judgment of the United States circuit court, the merits of the controversy in the case in which the judgment was rendered, or whether there was error, or hardship in the judgment, are not open for consideration by the jury. *Id.*
12. **PURCHASERS—RIGHT TO POSSESSION.**—Purchasers from the Southern Pacific Railroad Company of the lands adjudged to belong to it were entitled to be put in possession of said lands under executions issued upon the judgments so adjudging the title to, and awarding the possession of, said lands. *Id.*
13. **RESISTANCE OF MARSHAL.**—Where a body of from thirteen to thirty men, most of them armed, congregate about the marshal, who has a writ of possession in his hands for the purpose of execution, and are informed by the marshal of his official character and purpose, and the marshal attempts to read the writ, but is prevented from doing so by said parties, and informed that his character and purposes are known; that he cannot execute the writ; and he is partially surrounded by said parties standing in a semicircle about him from six to twelve feet distant, several of them drawing and leveling pistols at him in a threatening manner, and some of them directing him to consider himself a prisoner, and on peril of his life to surrender his weapon; these acts constitute an assault at common law, and an obstruction and resistance of the marshal in executing the writ. *Id.*
14. **SAME.**—The fact that the marshal was not actually on the land described in the writ at the time, but was near the line on the adjoining land, waiting the result of a conference then going on with the party to be put out of possession, who was a short distance off, does not affect the character of the acts alleged to be a resistance of the marshal, if he was there with the writ intending to execute it, and this was so understood by the parties charged. *Id.*
15. **WHO PROTECTED BY THE WRIT.**—The party present to receive possession of the land, and the party present to point out to the marshal the land described in the writ, were a part of the agencies employed in the execution of the writ, and while so engaged, were as much under the protection of the writ as the marshal himself. Any obstruction to the pointing out of the land, or to receiving possession from the marshal, is an obstruction to the execution of the writ. *Id.*
16. **ASSAULT, WHAT.**—Where several armed parties on horseback, with pistols drawn in a threatening manner, rush upon three men sitting quietly in wagons, who have committed no aggressive act, although having arms, and level their pistols at the parties so quietly sitting in the wagons within short pistol range, and demand a surrender of their arms in a menacing manner, these acts are unlawful, and constitute an assault. *Id.*
17. **SHOOTING, WHEN JUSTIFIED.**—If defendants rushed upon Clark, Crow, and Hart, with drawn pistols leveled at them in a menacing manner, while the latter, without having committed any aggressive act, were sitting

- quietly in their wagons in such a manner that Hart and Crow, or any reasonable man in their position, would have good reason to believe that their lives were in danger, and that it was necessary to shoot in self-defense, and having such reason did so believe, Hart and Crow would be justified in shooting, even if they fired the first shot. *Id.*
18. SELF-DEFENSE.—One who is menacingly assaulted with a deadly weapon, and is in danger of being instantly shot down, is not bound to wait till he is actually shot before firing a shot in self-defense. *Id.*
19. CONTINUED RESISTANCE OF MARSHAL.—If defendants made an assault upon the marshal, in the manner indicated in the eighth head-note, and then immediately thereafter made an assault upon Clark, Crow, and Hart in the manner indicated in the succeeding head-notes, the one being present to point out the land, and the other to receive possession, these acts constitute a continuance of the obstruction and resistance of the marshal in the execution of the writ. *Id.*
20. RESISTANCE OF MARSHAL.—Where the marshal is present with a writ of restitution, intending to execute it, and another party, in company with a large number of armed men, delivers to him a paper addressed to him as marshal, stating, substantially, that the writs cannot be executed except by force, and that it will require a thousand men to dispossess the parties, and at the same time directing him to leave the county, and details four armed to conduct him from the neighborhood, and the marshal, believing the party means what he says, and on account of such threats, and for that reason, desists from executing the writ, and withdraws in charge of the men so detailed, these acts constitute both an actual and successful resistance; and all those present aiding, abetting, or approving, are parties to the resistance. *Id.*
21. EVIDENCE OF CONSPIRACY.—Where the paper delivered to the marshal, referred to in the last head-note, was prepared by other parties with the knowledge and concurrence and at the suggestion of the party delivering it to the marshal, and given to him by the party so preparing, or partly preparing, it, to be so delivered, these acts, in connection with such subsequent delivery to the marshal, are evidence of a conspiracy, at least between the party or parties so preparing it for the purpose, and the party so receiving and subsequently delivering it to the marshal in pursuance of that purpose. *Id.*
22. ACT OF ONE CONSPIRATOR ACT OF ALL.—Where a conspiracy is once established, the acts of one of the conspirators in carrying forward the objects of the conspiracy are the acts of all the conspirators. *Id.*
23. THEFT OF ABANDONED PROPERTY.—ACT 1825, SECTION 9, CONSTRUED.—The ninth section of the act of congress of March 3, 1825, against plundering or stealing money, goods, merchandise, or other effects from or belonging to any ship or vessel, in distress or wrecked, lost or stranded, does not apply to property which has been abandoned by its owners. Property thus abandoned may be acquired by any one who has the energy and enterprise to seek its recovery, without violating the statute. *United States v. Smiley*, 640.
24. EXTRATERRITORIAL CRIMINAL JURISDICTION.—The criminal jurisdiction of the United States may, in some instances, extend to their citizens beyond their territory, as, for instance, for violation of treaty stipulations

by them abroad; for offenses committed in foreign countries where jurisdiction is by treaty conceded for that purpose, as in some cases in China and the Barbary States; for offenses committed on deserted islands or uninhabited coasts, by officers and seamen of vessels sailing under their flag; and for derelictions of duty by their ministers, consuls, and other representatives abroad. But except in cases like these (and their extra-territorial character is generally indicated in the law designating the act for which punishment is prescribed), the criminal jurisdiction of the United States is limited to their own territory, actual or constructive. Their actual territory is co-extensive with their possessions, including a marine league from their shores on the sea. Their constructive territory embraces vessels sailing under their flag. Wherever they go they carry the laws of their country, and for a violation of them their officers and seamen may be subjected to punishment. *Id.*

25. JURISDICTION OF PROPERTY BURIED IN SEA NEAR COAST.—In this case the vessel, which carried the money recovered by the accused, was at the time of its recovery broken up, without a vestige of it remaining. The money was buried in the sand several feet under the water of the sea, and was within one hundred and fifty feet of the Mexican shore: *Held*, that there was no jurisdiction of the United States over the place or property; and that the jurisdiction of Mexico over all offenses committed within a marine league of its shores, not on a vessel of another nation, was complete and exclusive. *Id.*

See CHINESE.

CUSTOM.

1. SAME—CUSTOM.—A custom of charging customers an arbitrary sum for telegrams, usually much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should appear that both parties knew of it. *Marge v. Strouse*, 204.

DAMAGES.

1. DAMAGES FOR BREACH OF CONTRACT.—A sum stipulated to be paid as liquidated damages for the breach of a contract, when there is no certain pecuniary standard whereby to measure the damages resulting from such breach, may be recovered upon proof of the stipulation and breach. *Harris v. Miller*, 319.
2. SAME.—But if the damages for the breach are certain, or can be reasonably ascertained by a jury, the damages agreed upon will be considered only as a penalty to cover the actual damage. *Id.*
3. CONSTRUCTION OF A CONTRACT.—H. and L. agreed to pay M. and C. one thousand eight hundred dollars, for five years, for certain rooms in a building to be erected by the latter, and also to make, execute, and deliver to them a good and sufficient bond "to their satisfaction," in the sum of two thousand dollars, conditioned for the payment of such rent: *Held*, 1. That M. and C. had a right to require a bond which was sufficient to secure the payment of the rent beyond a reasonable doubt; 2. That if M. and C., acting in good faith upon the best information conveniently within their reach, rejected a bond tendered by H. and L. as

insufficient, the latter are bound by their action; and, 3. That the circumstances considered, the contract should be construed as requiring a bond executed by other persons than H. and L. *Id.*

See ADMINISTRATOR, 3; MEASURE OF DAMAGES.

DANGEROUS WEAPON.

See CRIMINAL LAW, 4.

DEATH AS CAUSE OF ACTION.

1. **DEATH, ACTION FOR.**—Although an action may not lie at common law to recover damages for the death of a person, it will at the civil law, and therefore *semble* that it will in admiralty. *Holmes v. O. & C. R. Co.*, 262.
2. **MARINE TORT.**—A marine tort is one that occurs on any public navigable water of the United States, whether caused by a wrongful act or omission, and the proper district court, as a court of admiralty, has jurisdiction of a suit to recover damages therefor. *Id.*
3. **RIGHT GIVEN BY STATE STATUTE.**—The jurisdiction of the national courts does not depend upon the origin of the rights of the parties; and where a state statute gives a right, the same may be asserted or enforced in such courts whenever the citizenship of the parties or the nature of the subject will permit. *Id.*
4. **SAME.**—The right given by section 367 of the Or. Civ. Code, to an administrator to recover damages on account of the death of his intestate from the party by whose act or omission such death was caused, may be enforced in the national courts. *Id.*
5. **SAME—SUIT IN ADMIRALTY.**—When a passenger on the railway ferryboat plying across the Wallamet river between East Portland and Portland was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the district court by the administrator of the deceased, to recover the damages given therefor by section 367, *supra*. *Id.*

DEDICATION TO PUBLIC USES.

1. **DEDICATION OF LAND TO PUBLIC USES.**—A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes, by the owner, manifested by some clear declaration of the fact. *Grogan v. Town of Haywood*, 498.
2. **REVOCATION OF DEDICATION.**—Such dedication is irrevocable when third parties have been induced to act upon it, and part with value in consideration of it; although the property is not at once subjected to the uses designated, and the dedication has not been formally accepted by the public authorities. *Id.*
3. **SALE BY MAP DEDICATION.**—A sale of property, in a place laid out as a town, by reference to a map on which streets and public grounds are designated, is a sale, not merely for the price named in the deed, but for the further consideration that the streets and public grounds shall remain forever open to the purchaser, and to any subsequent purchasers in the town. The purchaser takes not merely the interest of the grantor in the land, but, as appurtenant to it, an easement in the streets and public

grounds named, with an implied covenant that subsequent purchasers shall be entitled to the same rights. *Id.*

DEVIATION.

1. **DEVIATION.**—A departure from the due course of a voyage, to save property merely, is a deviation, and will forfeit the insurance; but a departure to save life is not. But although the law will, as between the insurer and insured, excuse a departure from motives of humanity, a master is not correspondingly bound to make such departure, even to save the life of one of the crew; but the time and risk likely to be consumed and incurred in such departure, as compared with that incident to the direct voyage, are to be considered, and have a controlling influence in the matter. *The Chandos*, 544.
2. **SAME.**—On June 10, in latitude 38° south and longitude 91° west, the ship *Chandos* was on her way to Portland, Oregon, with a cargo of railway iron, without a surgeon or any surgical appliances on board, when the libellant fell from aloft and broke his thigh bone: *Held*, that if the ship could have made a port—as, for instance, Valparaiso, distant about one thousand and eighty miles—in five or six days, it would have been the duty of the master to have gone there and obtained surgical aid for the libellant; but if it could not have been done in less than two weeks, he was not bound to make the departure. *Id.*

DISTILLED SPIRITS.

1. **DISTILLED SPIRITS—STAMPS.**—The use, to contain domestic distilled spirits, of casks, etc., in which foreign distilled spirits, wines, etc., have been imported, is prohibited by section 12 of the act of March 1, 1879, notwithstanding that the stamps required by law have been effaced, obliterated, and destroyed. *United States v. Half Barrel Spirits*, 63.

DIVORCE.

1. **CODE OF PROCEDURE.**—A provision in a code of procedure giving the husband or wife, “in all cases,” a certain interest in the lands of the other, as an incident to and consequent upon a decree of divorce being given at the suit of either, is not to be construed as a general statute regulating the right of the husband and wife in the lands of each other generally, and in any event, but as confined to those cases in which such decree is given under such code of procedure and, in the courts of the state. *Barrett v. Failing*, 473.
2. **DECREE OF DIVORCE.**—Section 495 of the Or. Code of C. P. provides, that, “in all cases” of divorce, the prevailing party shall be entitled to one third of the lands then owned by the other: *Held*, that the right is conferred by the statute, and results wholly from the entry of the decree of divorce, and not from any provision in it to that effect, but that it does not include or affect a decree of divorce given in another state or country. *Id.*

DONATION ACT.

1. **PATENT, CONTRADICTION OF.**—In an action at law, a patent to a married settler, under the donation act of Oregon, and his wife, India, cannot be

- contradicted and avoided by showing that the true wife of such settler was another person named Angeline. *Sharp v. Stephens*, 48.
2. CLAIM—DONATION.—The boundaries of a claim, under the donation act, are a part of the public surveys of the country, and a description of a tract of land as a claim, number 70, in township 20 south, of range 3 west, is sufficiently certain in a decree, or elsewhere. *Alexander v. Knoz*, 54.
 3. DONATION—WIFE'S SHARE.—Where a claim was taken up by a married settler, under section 5 of the donation act, after January 20, 1852, and the wife died before January 30, 1854, and before the completion of the residence and cultivation required by the act, her share of the donation was, by virtue of the act of January 20, 1852 (Ses. L. 64), her separate property, and upon her death descended to her heirs unaffected by any claim of the husband on account of the marriage, as directed by the common law. *Id.*
 4. PATENT—MISTAKE.—A married settler, under the donation act, fraudulently procured a certificate and patent to the wife's share of the donation to be issued to a woman not his wife: *Held*, that a court of equity had jurisdiction to correct the error by requiring the patentee or her assigns to convey the premises to the wife or her assigns. *Stevens v. Sharp*, 113.
 5. SAME—QUESTION OF LAW.—Whether a settler, under the donation act, upon unsurveyed lands could commute his residence thereon, under section 1 of the acts of February 14, 1853, and July 17, 1854, by the payment of one dollar and twenty-five cents an acre therefor, is a question of law, and therefore the decision of the land department thereon may be reviewed by this court upon the suit of a party having an equity in the premises prior to such entry, but not otherwise, except in a suit by the United States to cancel the patent issued upon such entry. *Bear v. Luse*, 148.
 6. GRANT TO CHILDREN UNDER SECTION 4 OF THE DONATION ACT.—Upon the death of a married settler under section 4 of the donation act (9 Stat. 497), before receiving a patent for the donation, and without having exercised the power to sell or devise the same, his interest therein is granted to his widow and children or heirs, and they take as the direct donees of the United States; and not by descent from such settler, and therefore the property cannot be sold by the administrator to pay his debts. *Cutting v. Cutting*, 396.
 7. CHILDREN.—The word children, as used in section 4 of the donation act, includes grandchildren, so that the children of a deceased child are entitled by right of representation to a child's part in the donation acquired thereunder by their grandparents. *Id.*
 8. CHILDREN OR HEIRS.—The grant of the interest of a deceased settler in the donation to his "children or heirs," as provided in section 4 of the donation act, takes effect in favor of the children first and to the heirs only in default of children. *Id.*
 9. HEIRS OF A DECEASED SETTLER.—The heirs of a deceased settler, under section 4, are such persons as the local law—the law of Oregon—makes his heirs. *Id.*
 10. PATENT TO THE HEIRS OF A DECEASED SETTLER.—A patent to the heirs of a deceased settler, under said section 4, presupposes that it was found in

the land department that such settlers left no children, and the contrary cannot be shown to affect the patent in an action at law. *Id.*

EQUITY.

1. **LIMITATION.**—Cases of constructive trust being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief thereon, and when the trust arises out of the fraud of the defendant, or those under whom he claims, there is no fixed rule upon the subject, but each case is decided according to its own facts and circumstances. *Stevens v. Sharp*, 113.
2. **LOCAL STATUTE OF LIMITATIONS.**—A state statute of limitation is not applicable in the national courts in a suit in equity, but under ordinary circumstances the limitations prescribed therein will be regarded as reasonable. *Id.*
3. **SUIT TO AFFECT A PATENT.**—Equity does not have jurisdiction to affect a patent except upon the ground of an antecedent equity in the plaintiff which was disregarded in the issuing thereof, and therefore a party who claims to have settled upon a tract of public land subsequent to the settlement and entry thereof by another who has received the patent for the same, upon the ground that the settlement and entry of the patentee were illegal and void, cannot maintain a suit to set aside such patent or charge the patentee as his trustee of the premises. *Bear v. Luse*, 148.
4. **QUESTIONS OF FACT—DECISIONS OF THE LAND DEPARTMENT.**—Questions of fact decided in the land department are not subject to review by the courts, except for fraud or mistake other than an error of judgment; and where there is a contest in such department between one who claims to be a settler upon a portion of the public land, to cancel the entry of a prior settler upon the same land, the decision therein precludes farther inquiry by the parties into any question of fact which might properly have been made in such contest, the same as if it had been actually so made and considered. *Id.*
5. **TOWN-SITE ACT CONSTRUED—EQUITY JURISDICTION.**—Where Berry, who had entered land for a town site under section 2387, R. S., conveyed a portion of it to an occupant, and thereafter sued in equity to recover the price and to establish a vendor's lien therefor as against F., T., and D., who had purchased the same land at an execution sale: *Held*, that the complainant, Berry, had no vendor's lien, and that, having failed to establish a right to the equitable relief demanded, he could have no decree in equity for the purchase money. *Berry v. Ginaca*, 390.
6. **RES ADJUDICATA.**—Where in an action at law the plaintiff alleges a conspiracy among sundry parties, defendants to the action, by means of which a large amount of real estate of the plaintiff has been fraudulently sold, and the proceeds appropriated by the alleged conspirators; and upon issues taken upon all the allegations of the complaint, a trial is had and all the issues found in favor of the defendants, and final judgment entered upon the verdict, the matters so in issue, found, and adjudged, are *res adjudicata*, and conclusive of the rights of the parties. *Price v. Dewey*, 493.
7. **SAME.**—Where the complainant in a bill in equity alleges matters before set up and determined in an action at law, as stated in the last head-note,

and prays an account of the proceeds of the real estate alleged to have been fraudulently disposed of, and a decree for the amount, a plea setting up the former adjudication is a valid plea in bar to the bill. *Id.*

8. **SAME.**—The fact that at the time of the commencement of the former action, the defendants had not disposed of all the real estate, the title to which they had acquired by means of the alleged fraudulent practices, does not affect the conclusiveness of the prior adjudication. *Id.*
9. **SAME—SUBSEQUENTLY DISCOVERED EVIDENCE.**—Nor does the fact that the complainant commenced and tried the former action before he discovered, or obtained all the evidence that he claims to have since found to establish the alleged fraudulent acts—the said evidence being matters of public record, or otherwise open to discovery upon diligent inquiry—affect the conclusiveness of the determination. *Id.*
10. **PETITION FOR REHEARING—PRACTICE.**—A petition for a rehearing in a court of original jurisdiction, after entry of a final decree in an equity suit, is not an *ex parte* proceeding, and can only be presented on notice, and considered after the other side has had an opportunity to answer it. *Giant Powder Co. v. Cal. Vig. P. Co.*, 508.

See LIMITATIONS OF ACTIONS, 4, 5; PATENTS, 3.

EVIDENCE.

See CRIMINAL LAW; JUDGMENT ROLL, 2.

EXCEPTIONS.

1. **BILL OF EXCEPTIONS.**—Notwithstanding the rule of court requiring a bill of exceptions to be drawn up within ten days after the trial, a case may be excepted from its operation when it is just to do so. *Marye v. Strouse*, 204.

FELLOW-SERVANT.

See ADMIRALTY, 20.

FINDINGS.

1. **FINDINGS OF FACT.**—After a general finding of fact, judgment thereon and the lapse of a term, special findings cannot be added to or substituted for the general finding. *Marye v. Strouse*, 204.
2. **SAME.**—A circuit court is not bound to make a special finding. *Id.*

FISHING.

See CONSTITUTIONAL LAW, 23.

FORFEITURE.

1. **FORFEITURE.**—Whether a forfeiture given by statute takes effect upon the commission of the act on account of which it is given, or upon the seizure or condemnation of the property, depends primarily upon the intention of congress as evidenced by the language of the statute; but when that is doubtful or uncertain, resort may be had to the rules of the common law relating to forfeiture. *The Kate Heron*, 106.
2. **RULE AT COMMON LAW.**—A forfeiture of lands at common law related to the time of the commission of the offense; but in case of chattels, the

forfeiture did not take effect until the conviction of the offender, or a finding that he had fled. *Id.*

3. "LIABLE TO FORFEITURE."—Section 4189 of the R. S., which declares that for the commission of a certain act a vessel "shall be liable to forfeiture," does not effect a present absolute forfeiture, but only gives a right to have the vessel declared forfeited upon due process of law, and the property in the same remains in the owner until seizure and condemnation, which latter relates back to the time of seizure, and invalidates all intermediate sales. *Id.*
4. BONA FIDE PURCHASER.—A purchaser in good faith of a vessel liable to forfeiture under said section 4189, and before seizure, acquires the title thereto, and may hold the same against the United States. *Id.*

FRANCHISE.

See SOUTHERN PACIFIC RAILROAD, 8-20.

FRAUDS.

1. FRAUD—CONSPIRACY—COLLUSIVE JUDGMENT—FICTITIOUS INDEBTEDNESS—FABRICATED ANTEDATED NOTES.—Where members of an insolvent firm, with intent to defraud firm creditors, conspired with a person to whom the firm was indebted in only a small amount to have an attachment levied on the firm property, and a judgment to be taken upon fictitious and antedated firm notes fabricated for the purpose, and to transfer to him all the firm property then *in transitu*, and for which the firm held bills of lading; and, in pursuance of such conspiracy, judgment was recovered, the firm property sold on execution and bid in by the plaintiff in the collusive suit, and the remaining property of the firm secretly transferred to him: *Held*, that he was liable to the assignees in bankruptcy, as representative of the firm creditors, for the value of all of the firm property so fraudulently obtained by him, and will be decreed a trustee of such property and of its proceeds for the benefit of the firm creditors represented by the assignee. *Shainwald v. Lewis*, 556.

See BANKRUPTCY, 3; INSOLVENCY.

FRAUDS, STATUTE OF.

1. STATUTE OF FRAUDS.—A parol contract in relation to lands, if set out in the bill, is to have the same effect, as against the plaintiff, as if it had been made in writing. *Aiken v. Ferry*, 79.
2. VOID SALE—CHANGE OF POSSESSION.—A sale which was objected to as void against creditors under the laws of this state, because not accompanied by an actual, immediate, and continued change of possession, sustained in a suit by an assignee in bankruptcy on the authority of *Stewart v. Platt*, 101 U. S. 731. *Lloyd v. Foley*, 424.

HABEAS CORPUS.

1. HABEAS CORPUS—JURISDICTION.—Where an alien prisoner, held in custody in execution of a judgment rendered by a state court convicting him of an offense created by a state statute, alleges in his petition that the statute under which he is convicted was passed in violation of the

constitution of the United States, and of the provisions of a treaty of the United States with the nation of which he is subject, the circuit court has jurisdiction on a writ of *habeas corpus* to inquire into the validity of the statute and judgment, and, if found to be in violation of such constitution and treaty, is authorized to discharge the petitioner from such custody. *In re Wong Yung Quy*, 237.

2. UNCONSTITUTIONAL STATUTE VOID.—A statute of a state creating an offense passed in violation of the constitution of the United States, or of a treaty with a foreign nation, is void, and a judgment convicting a party of the offense created by said void statute is also void, and not merely erroneous and voidable. *Id.*
3. SAME—HABEAS CORPUS.—A party arrested for the offense of selling goods in Nevada for his employers in California, without a license, in violation of a statute which makes no discrimination against goods brought from another state, is not restrained of his liberty in violation of the constitution or laws of the United States. *In re Rudolph*, 296.
4. IMPRISONMENT.—The national courts have jurisdiction to relieve any person from imprisonment, under color of the authority of a state without due process of law, contrary to the fourteenth amendment. *In re Ah Lee*, 410.
5. DUE PROCESS OF LAW.—A person imprisoned under a valid law, although there is error in the proceeding resulting in the commitment, is not imprisoned without due process of law, contrary to the fourteenth amendment. *Id.*
6. DE FACTO OFFICER.—A person in office by color of right is an officer *de facto*, and his acts, as such, are valid and binding as to third persons; and an unconstitutional act is sufficient to give such color to an appointment to office thereunder. *Id.*
7. SAME.—The constitution of Oregon authorizes the legislature, when the population of the state equals two hundred thousand, to provide by election for separate judges of the supreme and circuit courts. On October 17, 1878, the legislature passed an act providing for the election of such judges at the general election in June, 1880, and also that the governor should appoint such judges in the mean time, which was done: *Held*, that admitting such act was unconstitutional, because the population of the state was less than two hundred thousand, and that the appointments by the governor were therefore invalid, and also because the constitution only authorized the selection of such judges by election, still the persons so appointed under the act and performing the duties of the judges of said courts were judges *de facto*, and a person imprisoned under a judgment given in one of them, convicting him of a crime, is not thereby deprived of his liberty without due process of law, contrary to the fourteenth amendment. *Id.*

See CONSTITUTIONAL LAW; TREATY.

HOMESTEAD.

1. JUNIOR MORTGAGEE—HOMESTEAD.—Where a mortgage was made on two pieces of real estate and a subsequent mortgage was made on one of them, and thereafter a homestead was declared in respect of the land not embraced in the second mortgage: *Held*, that the equitable right of the

junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he had exclusive claim, could not be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. *Abbott v. Powell*, 91.

HUSBAND AND WIFE.

1. CODE OF PROCEDURE.—A provision in a code of procedure giving the husband or wife, "in all cases," a certain interest in the lands of the other, as an incident to and consequent upon a decree of divorce being given at the suit of either, is not to be construed as a general statute regulating the right of the husband and wife in the lands of each other generally, and in any event, but as confined to those cases in which such decree is given under such code of procedure, and in the courts of the state. *Barrett v. Failing*, 473.
2. DECREE OF DIVORCE.—Section 495 of the Or. Code of C. P. provides, that, "in all cases" of divorce, the prevailing party shall be entitled to one third of the lands then owned by the other: *Held*, that the right is conferred by the statute, and results wholly from the entry of the decree of divorce, and not from any provision in it to that effect, but that it does not include or affect a decree of divorce given in another state or country. *Id.*

See CITIZEN, 1, 2.

IMPORTS.

1. IMPORTS—CONSTITUTION.—The word "imports," as used in that clause of the constitution of the United States, which says that "no state shall levy any imposts or duties on imports or exports," does not apply to articles carried from one state into another, but only to articles imported from foreign countries. *In re Rudolph*, 295.
2. DRUMMER'S LICENSE.—A state statute which imposes a license tax upon all traveling merchants, agents, etc., who travel in the state of Nevada and sell, or offer to sell, goods by sample or otherwise, to be delivered at a future time, without any discrimination against the goods or products of other states, does not violate the provisions of the constitution of the United States forbidding the levying of imposts, or duties on imports, or conferring upon congress the power to regulate commerce between the states, with respect to goods sold by such traveling agents or drummers, for their employers doing business in California, to be shipped at a future day to the purchaser. *Id.*

INDIANS AND INDIAN COUNTRY.

1. INDIAN COUNTRY.—The laws of the United States extending the laws regulating intercourse with Indian tribes over the tribes in Utah, Nevada at the time of their passage being a part of Utah, do not make Nevada Indian country. *United States v. Leathers*, 17.
2. RESERVATION.—The tract of country called the "Pyramid Lake Indian Reservation" has been set apart by competent authority for the use of the Pah Utes and other Indians residing thereon. *Id.*
3. SAME.—It is Indian country within the meaning of sections 2133 and 2139 of the R. S. *Id.*

4. **INTENT.**—Where the statute contains nothing requiring acts to be done knowingly, and the acts are not *malum in se*, nor infamous, but only wrong because prohibited, a criminal intent need not be proved. The offender is bound to know the law, and obey it, at his peril. *Id.*
5. **INDIAN.**—When under charge of Indian agent, within the meaning of the law prohibiting the sale of spirituous liquors to him. *United States v. Osborne*, 406.
6. **CITIZENSHIP.**—Indians are not born subject to the jurisdiction of the United States, and are therefore not citizens thereof, or within the purview of the fifteenth amendment. *Id.*
7. **SAME.**—The state of Oregon may make an Indian a voter, and the United States may make him a citizen, in which latter case, by the operation of the fifteenth amendment, he would become a voter of the state in which he resides, if otherwise qualified, according to its laws; but an Indian cannot become a citizen himself, and without the consent, in some form, of the United States. *Id.*
8. **SAME.**—The United States has not conferred citizenship upon Indians in Oregon. *Id.*
9. **NATURALIZATION.—WHITE PERSON.**—A person of half white and half Indian blood is not a "white person" within the meaning of this phrase as used in the naturalization laws, and therefore he is not entitled to be admitted to citizenship thereunder. *In re Camille*, 541.

INHABITANT.

1. **INHABITANT.**—The word "inhabitant," as used in section 1053 aforesaid, has a narrower and more limited signification than domicile, and implies a personal presence in the county as a dweller therein. *Holmes v. O. & C. R. Co.*, 262.

INSOLVENCY.

1. **PREFERENCE.**—The creditor of an insolvent firm, with knowledge of such insolvency, procured P., a member of the firm, to make his promissory note, secured by a mortgage upon his individual property, in payment of the firm debt: *Held*, 1. That such payment was an unlawful preference over the other creditors of the firm, and therefore invalid; 2. That the mortgage was an unlawful preference over the creditors of P., and also the creditors of the firm, and therefore invalid; 3. That the creditor could only prove his debt against the estate of the firm, and then only for a moiety thereof. *In re Parker*, 248.
2. **FRAUD BY A CREDITOR.**—The actual fraud on the part of a creditor receiving a preference contrary to section 39 of the bankrupt act, as amended by section 12 of the act of June 22, 1874 (18 Stat. 180), which will prevent him from proving his debt for more than a moiety thereof, is something more than the passive receipt of payment from an insolvent debtor, with reason to believe him insolvent, but the creditor must be an actor in the fraud—must do something to induce or coerce his debtor to make him a payment under circumstances constituting it an unlawful preference. *Id.*

INSURANCE.

1. **TIME POLICY.—LIABILITY OF INSUREES.—SEAWORTHINESS.**—The insurers on a time policy made in this state and under its laws are not liable, if it ap-

pear that the vessel was not seaworthy at the commencement of the voyage on which the loss occurred. *Pope v. Swiss Lloyds Ins. Co.*, 533.

INTEREST.

1. APPROPRIATION.—Where a statute does no more than prohibit a recovery of interest in excess of ten per cent., when the contract is not in writing, but does not otherwise make the rate of interest unlawful, interest in excess of that rate may be included in an account stated; and money paid on account by the debtor may be applied to the payment of such interest by the creditor in the absence of any appropriation by the debtor. *Marye v. Strouse*, 204.

See ACCOUNT, 2.

JUDGMENT AND JUDGMENT ROLL.

1. JUDGMENT.—The judgment of a court of general jurisdiction is presumed to have been rightly given, upon sufficient pleadings and process, until the contrary appears; and therefore, where it appears that a decree might have been given, either in a suit which was a nullity for want of a real plaintiff, or in another which was not, this presumption is sufficient to sustain the validity of the same. *Alexander v. Knox*, 54.
2. JUDGMENT ROLL.—The certificate of the clerk is not evidence of the character or legal effect of the paper to which it is appended—as, for instance, that it is a copy of judgment roll, but only that it is a true copy of the original, on file in his office, and as to what it is, it must speak for itself. *Id.*
3. LIEN OF A JUDGMENT.—E. conveyed certain property in fraud of his creditors, and afterwards certain creditors of the firm of E. & C. obtained judgments against said firm and docketed the same; then the firm and members thereof were adjudged bankrupts, and the assignee brought suit against the grantee in the fraudulent conveyance to have the same set aside and obtained a decree to that effect, whereupon the property was sold by the assignee, free from the liens of such judgments, if any, and the proceeds brought into this court for distribution: *Held*, 1. That the lien of such judgments only attached to the property then belonging to the judgment debtor; 2. That the conveyance passed all the estate of the grantor in the premises to the grantee, qualified only by the right of the creditors to subject the same to the payment of their debts, in the manner and time prescribed by law; and, 3. That therefore the lien of the judgments did not attach to the premises, and the proceeds of the sale thereof are the separate estate of E., and must be first equally applied to the payment of his separate creditors. *In re Estes*, 459.

See FRAUDS, 1.

JURISDICTION.

See ABANDONED PROPERTY, 2, 3; ASSIGNEE; CRIMINAL LAW, 23-25.

JURY.

See CRIMINAL LAW, 11.

LAND OFFICE.

1. DECISIONS OF THE LAND OFFICE.—The action of the land office upon questions of fact arising in the course of its business, is conclusive upon other tribunals, unless it appears that such action is the result of fraud or mistake, other than an error of judgment in estimating the value of evidence, or making deductions therefrom; but for error in the construction or application of the law relating to such business, its decisions may be reviewed and modified or annulled by the courts. *Aiken v. Ferry*, 79.

LARCENY OF ABANDONED PROPERTY.

See CRIMINAL LAW, 23-25.

LIEN.

See ADMIRALTY, 17; JUDGMENT, 3; VENDOR'S LIEN, 1.

LIMITATIONS OF ACTIONS.

1. LIMITATIONS.—Under section 721 of the R. S., the state statute of limitations applies to actions in the national courts, except where the laws of the United States otherwise provide. *Sayles v. O. & C. R. Co.*, 31.
2. SAME—PATENT CASES.—The limitation contained in section 55 of the patent act of July 8, 1870 (16 Stat. 206), was repealed by operation of section 5596 of the R. S., but as to all actions and suits upon causes arising before said repeal—June 22, 1874—said limitation was continued in force by section 5599 of the R. S., and therefore an action to recover damages for the infringement of a patent before June 22, 1874, is not within the operation of the state statute of limitations. *Id.*
3. AMENDMENT OF STATUTE.—*Semble* that under section 22 of article IV of the constitution of the state of Oregon, a section of a statute cannot be amended by simply repealing a clause or subdivision of it, and that therefore subdivision 5 of section 6 of the Or. Civ. Code, in which six years are given to bring this action, is still in force notwithstanding the attempt to repeal the same by the act of October 22, 1870. (Ses. L. 34.) *Id.*
4. LIMITATION.—Cases of constructive trust being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief thereon; and when the trust arises out of the fraud of the defendant, or those under whom he claims, there is no fixed rule upon the subject, but each case is decided according to its own facts and circumstances. *Stevens v. Sharp*, 113.
5. LOCAL STATUTE OF LIMITATIONS.—A state statute of limitation is not applicable in the national courts in a suit in equity, but under ordinary circumstances, the limitations prescribed therein will be regarded as reasonable. *Id.*
6. ADVERSE POSSESSION—DIVISION LINE.—Where one claiming title by virtue of a deed, describing the land according to the United States survey, took possession, marked the dividing line, and occupied thereto exclusively, claiming title as to the true boundary: *Held*, that although such line was not the true one called for in the deed, the possession was adverse, and, when continued long enough, a bar. *Brown v. Leete*, 332.

7. ACQUIESCENCE—DIVISION LINE.—Acquiescence in a dividing line for a period equal to that fixed by the statute of limitations for gaining title by adverse possession, binds the party acquiescing to that line. *Id.*
8. ADVERSE POSSESSION OF PUBLIC SQUARE.—No one can acquire by adverse occupation, as against the public, the right to a street or square dedicated to public uses. *Grogan v. Town of Hayward*, 498.

See SWAMP LANDS, 10.

MALICIOUS ARREST.

1. MALICIOUS ARREST.—The defendant caused the arrest of the plaintiff without probable cause, but not from any actual ill-will towards him or any specific desire to vex or annoy him; but for the purpose of finding out who had forged a certain note in his name, then in the plaintiff's possession, and which he had claimed to be valid and to have acquired in good faith: *Held*, that the arrest was malicious, because the defendant had no right to experiment in that way with the liberty and good name of the plaintiff; that the act was purposely wrong and unlawful and therefore malicious. *Johnson v. Ebberts*, 538.

MERGER.

1. MERGER.—The former ruling in this case affirmed on rehearing. (See 5 Saw. 336.) *Or. & Wash. T. I. Co. v. Shaw*, 92.

MINES AND MINING CLAIMS.

1. ONLY CITIZENS CAN LOCATE MINING CLAIMS.—Under the act of Congress of May 10, 1872, relating to the public mineral lands, none but citizens of the United States, and those who have declared their intention to become such, can acquire any right to such lands by location. *North Noonday M. Co. v. Orient M. Co.*, 299.
2. HOW NATURALIZED, AND MODE OF PROOF.—A foreign-born son of an alien may become a citizen by being naturalized, or by the naturalization of his father, during his minority; but whether he or his father was so naturalized or not, is a question of fact for the jury; and, as tending to prove that fact, the affidavit of the party himself is, under the statute, competent evidence, for all purposes of said act of May 10, 1872. *Id.*
3. POWER OF MINERS TO LIMIT WIDTH OF LODGE CLAIMS.—By implication, the act of May 10, 1872, confers upon the miners the right to limit the width of a lode claim to twenty-five feet on each side of the middle of the vein. *Id.*
4. MINERS' RULES MUST BE IN FORCE.—But to be of any validity, a rule or custom of miners must not only be established or enacted, but must be in force at the time and place of the location. It does not, like a statute, acquire validity by the mere enactment, but from customary obedience and acquiescence of the miners. It is void whenever it falls into disuse, or is generally disregarded. *Id.*
5. QUESTION OF FACT.—It is a question of fact for the jury whether or not a mining law or custom is in force; but when shown to have been in force, the presumption is that it continues in force until the contrary is proved; and parol evidence is admissible to show whether the rule or custom is in force or not. *Id.*

6. **DEFINITION OF VEIN OR LODGE.**—A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin or many feet thick, or irregular in thickness; and it may be rich or poor, at the point of discovery, provided it contains any of the metals named in the statute. *Id.*
7. **DISCOVERY OF A VEIN.**—No rights can be acquired, under the statute, by location, before the discovery of a vein or lode within the limits of the claim located. *Id.*
8. **DISCOVERY OF VEIN AFTER LOCATION.**—But a location is made valid by the discovery of a vein or lode at any time after the location, provided that such discovery is made before any rights are acquired in the same claim by other persons. *Id.*
9. **OTHER VEINS THAN THOSE DISCOVERED.**—Where a valid location is made upon a vein or lode discovered, the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim extended vertically downwards, to which no right had attached in favor of other parties at the time the location became valid, although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical side lines. *Id.*
10. **HOW LOCATION TO BE MARKED.**—A location of a mining claim must be distinctly marked on the ground so that its boundaries can be readily traced, but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds, and written notices, whereby the boundaries can be readily traced, is sufficient. If the center line of a location of a lode claim, lengthwise, be marked by a prominent stake or monument at each end thereof, upon one of which is placed a written notice showing that the locator claims the length of said line upon the lode, from stake to stake, and a specified number of feet in width on each side of said line, such location is so marked that the boundaries may be readily traced; and so far as the marking of the location is concerned, is a sufficient compliance with the law. *Id.*
11. **RIGHT OF SUBSEQUENT LOCATOR TO OBJECT.**—A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location, or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim. *Id.*
12. **AS TO RECORD OF A MINING CLAIM.**—Where a rule or custom of miners, in force, requires a location to be recorded, such recording is necessary, otherwise not. To make a valid record, it must contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural or permanent monument, as will identify the claim; but such natural objects or permanent monuments are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If, by reference to any such natural object or permanent monument, the claim re-

- corded can be identified with reasonable certainty, the record will be sufficient in this particular, otherwise not. *Id.*
13. **WORK NECESSARY TO HOLD A CLAIM.**—The statute requires one hundred dollars' worth of work on each claim located after May 10, 1872, in each year, and in default thereof, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, and before any relocation is made, he thereby preserves his right to the claim; and no other person has any right to relocate it after such resumption of work, in good faith, by the first locator, even though the latter had failed to perform any work for the period of one year, or more, immediately before he resumed work. *Id.*
 14. **AS TO LOCATION AND SALE BY AN ALIEN.**—If, in the attempt by an alien to locate a claim, he performs all the acts necessary to a valid location by a citizen, and then conveys such claim to a citizen, who takes possession and continues to perform all the conditions required by law to hold such claim, such citizen thereby acquires and holds a valid title to the claim so located by the alien, as against all persons having acquired no right therein before such conveyance by the alien. *Id.*
 15. **JOINT LOCATIONS BY CITIZENS AND ALIENS.**—If a citizen and an alien jointly locate a claim not exceeding the amount of ground allowed by law to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen gives a valid title. *Id.*
 16. **CORPORATION, WHEN DEEMED A CITIZEN.**—A corporation organized and existing under the laws of California is to be deemed a citizen in the sense of the act of congress of May 10, 1872. *Id.*
 17. **WHAT IS ACTUAL POSSESSION.**—A person who has purchased a mining claim which had been properly located and marked out on the ground, and who is personally, or by agents, upon the claim, working and developing it, and keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim, by virtue of mining laws, but is in the actual possession of the whole claim. Such possession is a *possessio pedis* extending to the boundary lines of the claim. *Id.*
 18. **MINING CLAIM—PROOF OF CITIZENSHIP.**—On the trial of the right to a mining claim under chapter 6 of the R. S. of the United States, the affidavit of the party is made admissible in evidence by the provisions of section 2321, to prove the citizenship of a locator of the claim. *North Noonday M. Co. v. Orient M. Co.* (No. 2), 503.
 19. **TITLE BY ACTUAL POSSESSION.**—Where a party claiming title under a conveyance by specific bounds is in actual possession and occupation of a mining claim of no greater extent than the laws allow him to hold, and is actually engaged in working the same, which claim is also distinctly marked out by lines of stakes on both ends and at the corners, so that the boundaries are easily seen and traced, a party entering upon such actual possession without prior right is a trespasser, and can gain no rights as against the possessor, although the latter may not have taken up and held the claim in all particulars in the mode required by law to enable him to maintain a constructive possession. *Id.*

MISSIONS IN OREGON.

1. **GRANT TO MISSIONS IN OREGON.**—The grant to religious societies of mis-

- sion stations in Oregon, contained in section 1 of the act of August 14, 1848 (9 Stat. 323), is not confined to a single station to each society, but includes as many stations as were then actually occupied by each society for missionary purposes among the Indians. *Dalles City v. Missionary Society*, 126.
2. **PATENT—SURVEY.**—A patent issued under section 2447 of the R. S. upon a survey not approved by the surveyor-general is void; and in case of a grant under section 1 of the act of August 14, 1848, the survey to be approved by the surveyor-general necessarily involves the determination of the question, what is the quantity and boundary of the claim? *Id.*
 3. **MISSION STATION.**—The grant to religious societies contained in the act aforesaid of the missionary stations occupied by them in Oregon on August 14, 1848, not exceeding six hundred and forty acres, is not confined to the land actually inclosed and cultivated by them, but should be construed to include the maximum quantity at each station occupied by them—that is, claimed and in any way used by them, and not in the actual occupation of any one else. *Id.*
 4. **OCCUPATION OF MISSION STATION.**—“Occupancy” is a word of narrower signification than possession, and means to possess by laying hold of or being actually upon the thing possessed, continuously and exclusively. Prior to August 14, 1848, the title to all lands in Oregon was in the United States, and therefore no person could have constructive possession of any portion thereof, or any possession thereof or interest therein except actual possession or occupancy, and when this was given up or abandoned, the relation of the party to the land was absolutely terminated. *Id.*
 5. **MISSION STATION AT THE DALLES.**—The Missionary Society of the M. E. Church established a mission among the Indians at Wascopum, near the Grand Dalles of the Columbia, in 1838, and in September, 1847, abandoned and transferred the same to Dr. Whitman of the Presbyterian mission at Wallatpu, and never reoccupied the same: *Held*, that the society did not receive a grant of said station under section 1 of the act of August 14, 1848, because it was not at that date in the actual possession and occupation of the premises; that such occupation was a condition precedent to the taking effect of such grant, and therefore it mattered not whether the failure of the society to occupy the station in August, 1848, was voluntary, or was caused by the fear of hostile Indians. *Id.*
 6. **PAYMENT BY CONGRESS.**—The payment by congress to the missionary society of twenty thousand dollars, in June, 1860, on account of the reservation of three hundred and fifty-three acres of the Dalles mission station in March, 1850, for military purposes, and the loss or destruction of property thereon since 1847, by Oregon volunteers, Indians, or United States troops, did not have the effect to invest the society with the title to such station then, or on August 14, 1848; nor was it even an admission that the society had any legal right to the premises, but only that it asserted some kind of a claim thereto which it was deemed expedient to extinguish; nor could congress in June, 1860, by a direct recognition of a supposed prior grant to the society, affect the rights of others already acquired in the premises under the town site and donation acts. *Id.*

MORTGAGE.

1. JUNIOR MORTGAGEE—HOMESTEAD.—Where a mortgage was made on two pieces of real estate and a subsequent mortgage was made on one of them, and thereafter a homestead was declared in respect of the land not embraced in the second mortgage: *Held*, that the equitable right of the junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he had exclusive claim, could not be taken away or impaired by a declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. *Abbott v. Powell*, 91.

NATURALIZATION.

1. NATURALIZATION—WHITE PERSON.—A person of half white and half Indian blood is not a "white person" within the meaning of this phrase as used in the naturalization laws, and therefore he is not entitled to be admitted to citizenship thereunder. *In re Camille*, 541.

NEGLIGENCE.

1. NEGLIGENCE.—The defendant's steam ferry crossed the Wallamet river to Portland on a dark night with passengers from its railway, and P., in stepping from the boat to the pontoon at the landing, stumbled and fell into the river, and was drowned: *Held*, that the want of a guard to prevent the passengers from attempting to go ashore before the landing was safely made, and some sufficient signal to warn passengers when it was proper to go ashore, and particularly the want of sufficient light upon the boat and pontoon to enable passengers to readily observe the same and their relative situation, was negligence, and caused the death of P. *Holmes v. O. & C. R. Co.*, 262.
2. CONTRIBUTORY NEGLIGENCE.—This matter is a defense and the burden of proof is upon the defendant to establish it; and drunkenness is not *per se* such negligence, but only more or less evidence of it according to the circumstances. *Id.*
3. COMMON CARRIER.—A common carrier of passengers for hire is bound to provide for their safety so far as is practicable by the exercise of human care and foresight, and where one is drowned under the circumstances aforesaid, drunkenness, if it existed, was not contributory negligence. *Id.*
4. CRANE-LINE.—The primary purpose of a crane-line is to steady the back-stays, and in blustery weather it is very apt to chafe and wear out where it is fastened to the stays; and, therefore, it ought not to be used as a foot-rope without caution and the aid of the stays. *The Chandoe*, 544.
5. SAME.—The weather being wet, the night dark, and the wind strong, the libellant was ordered to go aloft and cast off the stop on the foretop-gallant halyards, which he did by going up the rigging and out on the crane-line to the space between the topmast and the top-gallant stay, and there untying the stop with both hands while he sat upon the crane-line, without any other hold or security, and, just as the stop was cast off, the line parted near the top-gallant stay, and the libellant was precipitated to the deck and seriously injured: *Held*, that the injury was caused by the negligence of the libellant in going on the crane-line without an oppor-

tunity of examining its condition and without holding to the stays by his arms or legs, or both, while casting off the stop; and that if, by reason of the negligence or misconduct of the mate, the crane-line was insufficient, still the libellant could not recover damages for the injury, because even then his own negligence substantially contributed to the result. *Id.*

6. FELLOW-SERVANT.—*Semble*, that the mate is not the fellow-servant of a sailor so as to exempt the master from liability for an injury caused to the latter by the negligence of the former. *Id.*

See ADMIRALTY, 5-9; SEAMEN, 2.

NEGOTIABLE INSTRUMENT.

1. NEGOTIABLE INSTRUMENTS, POSSESSION OF.—The possession of a negotiable instrument imports, *prima facie*, that the holder acquired it *bona fide*, for value, in the usual course of business, without notice of any fact impugning its validity; and that he is the owner thereof and entitled to recover the contents from all prior parties thereto. *Bank of Brit. N. Am. v. Ellis*, 96.
2. SAME—CONSIDERATION OF.—Inquiry into the consideration of a negotiable paper can only be made between privies or the immediate parties thereto—as the maker and payee or an indorser and his indorsee; all other parties are called remote, and as between them a consideration for making and indorsing the same is conclusively presumed; but a want of consideration may be shown by a defendant against a remote party, if the latter took the paper with the knowledge that such want could be shown against a nearer party. *Id.*
3. SAME—ACCOMMODATION MAKER OR INDORSER.—A party who makes or indorses a note without consideration and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and cannot show a want of consideration therefor against any one except the accommodated party. *Id.*
4. DEFENSE, WANT OF CONSIDERATION.—A party to negotiable paper who seeks to make the want of consideration a defense to an action thereon, must not only allege such want of consideration, but also show how and why he is entitled to make such defense as against the plaintiff in any aspect of the case made in the complaint. *Id.*
5. INDORSER.—An indorser's contract and liability is separate and distinct from that of the maker's; he agrees that the instrument will be paid, by himself, if not by the maker, and as his own debt and not that of another. *Id.*
6. INDORSEMENT.—In the absence of anything to the contrary, an indorsement is presumed to have been made regularly, after the making of the instrument and the indorsement of the same by the payee and before its maturity, and the indorser thereby becomes liable, as such, to any subsequent holder of the paper, whether he then had any interest in the same or not, unless there was an agreement that he should be liable only as guarantor, which was known to the holder at the time of acquiring the paper. *Id.*
7. INDORSERS, DISCHARGE OF.—When the holder of a negotiable instrument makes an early blank indorsement payable to himself, he does not thereby discharge subsequent indorsers from their liability as such. *Id.*

8. **ATTORNEY'S FEE.**—A stipulation by the maker of a negotiable instrument for the payment to the holder thereof of an attorney's fee in case the same is not paid without action is a valid promise, and passes with the instrument to each and every holder thereof; and each subsequent party to such instrument becomes thereby responsible in like manner for such fee to each and every subsequent holder thereof. *Id.*

NEW TRIAL.

1. **ERROR.**—Even where error has intervened in the course of the trial, a new trial should not be granted, if upon the whole record the court can clearly see that no injury resulted, and that the verdict is right on other grounds notwithstanding the error. *North Noonday Mining Co. v. Orient Mining Co.*, 503.

OFFICIAL BOND.

1. **CONDITIONS IN BOND.**—Where an officer is required by his superior, *colore officii*, to give a bond, with stipulations or provisions in the condition thereof, not required by statute, the bond is void *in toto*. *United States v. Humason*, 199.
2. **PUBLIC MONEY.**—The parties to an official bond for the safe keeping or accounting for public money are not liable for the loss of the same when such loss is caused by the act of God or the public enemy. *Id.*
3. **CONDITION.**—The performance of an express contract is not excused by reason of anything accruing after the contract; but in the case of a condition in a bond to do a thing, performance is excused when prevented by the law or an overruling necessity. *Id.*

ONUS PROBANDI.

See **BURDEN OF PROOF.**

PARTIES.

See **COUNTY**, 3.

PATENTS AND PATENT RIGHTS.

1. **PATENT CASES.**—The limitation contained in section 55 of the patent act of July 8, 1870 (16 Stat. 206), was repealed by operation of section 5596 of the R. S., but as to all actions and suits upon causes arising before said repeal—June 22, 1874—said limitation was continued in force by section 5599 of the R. S., and therefore an action to recover damages for the infringement of a patent before June 22, 1874, is not within the operation of the state statute of limitations. *Sayles v. O. C. R. Co.*, 31.
2. **PATENT, CONTRADICTION OF.**—In an action at law, a patent to a married settler, under the donation act of Oregon, and his wife, India, cannot be contradicted and avoided by showing that the true wife of such settler was another person named Angeline. *Sharp v. Stephens*, 48.
3. **PATENT—MISTAKE.**—A married settler, under the donation act, fraudulently procured a certificate and patent to the wife's share of the donation to be issued to a woman not his wife: *Held*, that a court of equity had jurisdiction to correct the error by requiring the patentee or her as

- signs to convey the premises to the wife or her assigns. *Stevens v. Sharp*, 113.
4. **PATENT—SURVEY.**—A patent issued under section 2447 of the R. S. upon a survey not approved by the surveyor-general is void; and in case of a grant under section 1 of the act of August 14, 1848, the survey to be approved by the surveyor-general necessarily involves the determination of the question, What is the quantity and boundary of the claim? *Dalles City v. Missionary Society*, 126.
5. **PATENTS—PROFITS RECOVERABLE IN EQUITY.**—In a suit in equity for the infringement of a patent by the use of the patented invention, the patentee is entitled to recover the profits resulting to the infringer from the use of the invention. *Knox v. G. W. Q. M. Co.*, 430.
6. **SAME—ROYALTY.**—In such case, the patentee is not limited in his recovery in equity to the amount of the royalty established by him for the use of his invention. *Id.*
7. **PROFITS DEFINED.**—The profits, which the patentee is entitled to recover in equity from the infringer by use of the patented invention, are not the profits of the business, but the value of the advantages derived by the infringer from the use of the invention over what he would have by the use of other machines then known and open to the public, and adequate to produce an equally beneficial result. *Id.*
8. **SAME.**—The fact that the general result of the business is unprofitable does not affect the recovery. The question is, What advantage in the reduction of cost, etc., has been derived from the use of the invention? *Id.*
9. **ACCOUNT EXTENDS TO TIME OF TAKING.**—The account should be extended to the time of the taking, including the profits resulting from the use of the invention, whether by means of the particular machine in use at the time of the commencement of the suit, or of others subsequently constructed and used. *Id.*
10. **INVENTION COMPARED WITH EXISTING MACHINES.**—For the purposes of an account of profits, the comparison of the invention should be made with other machines in existence, or known, and open to public use at the time of the infringement complained of, and not with machines subsequently invented, or for the first time constructed or known, or machines not open to public use. *Id.*
11. **EVASION—CHANGE OF LOCATION OF PART.**—A change of location of a part in a patented combination, where there is no new function performed by the changed member in its new location, will not evade a patent. *Id.*
12. **GIBBON'S PATENT FOR IMPROVEMENT IN PANTALOONS**, No. 178,287, dated June 6, 1876, sustained. *Elfelt v. Steinhart*, 480.
13. **GIBBON'S PATENT FOR IMPROVEMENTS IN POCKETS OF WEARING APPAREL**, No. 178,428, dated June 6, 1876, construed, and held to be a patent for a combination. *Id.*
14. **THE STITCHED PERPENDICULAR PARALLEL LINES**, extending above and below the pocket openings, are an element in the combination of said patent; and a pocket opening made without this element, or an equivalent, does not infringe either claim of the patent. *Id.*
15. **THE PENA PATENT** does not contain the stitched perpendicular parallel lines extending above and below the pocket opening, and as it does not

contain this element of the combination in Gibbon's patent, it is not an infringement. *Id.*

16. REISSUED PATENTS.—A reissue of a patent can only be had, under the R. S., when the original patent is inoperative, or invalid from one of two causes, either by reason of a defective or insufficient specification, or by reason of the patentee claiming, as his own invention or discovery, more than he had a right to claim as new—and even then only where the error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention. *Giant Powder Co. v. Cal. Vig. P. Co.*, 508.
17. JURISDICTION OF COMMISSIONER TO REISSUE PATENTS.—The power to accept a surrender, and to issue new letters of patent, is vested exclusively in the commissioner of patents, and his decision in such cases is not open to collateral attack in a suit for the infringement of the reissued letters. But the commissioner being an officer of limited authority, this does not preclude the examination by the court of the original and reissued patents, to see whether or not they disclose on their face a case in which he had jurisdiction to act. *Id.*
18. REISSUED PATENT, WHEN VOID.—If, upon a comparison of the original and reissued patents, it appears that the commissioner has acted in a case in which he had no jurisdiction, or that he has exceeded his jurisdiction, the reissued letters are void. *Id.*
19. ENLARGING CLAIM IN REISSUE.—Whenever it appears, on a comparison of the two letters patent, that the original patent is valid and operative to the extent of its specifications and claim, the commissioner has no authority to grant a reissue enlarging the claim beyond the original specifications. If the patentee has invented or discovered something beyond the original specifications and claim, his course is to seek a separate patent for it. *Id.*
20. PRESUMPTION OF ABANDONMENT.—If a patentee does not embrace by his specifications and claim all that he might have done, and there has been no clear mistake, inadvertence, or accident in their preparation, the presumption of law is that he has abandoned to the use of the public everything outside of them, or has postponed any additional claim for further consideration. *Id.*
21. INEXPLOSIVE, IN WHAT SENSE USED.—The court can examine into the history of a patent, so as to be able to read the specifications annexed to it in the light of the inventor's knowledge: *Held*, therefore, in view of the history of the labors of the patentee in this case, and the specifications of the patent, that the inventor must be considered to have used the term "inexplosive" in its natural and ordinary sense, and that the attempt to limit its meaning was an after-thought of his assignees, so as to bring within it compounds not contemplated by him. *Id.*
22. REISSUE FOR DIFFERENT INVENTION VOID.—Where the original patent described a compound consisting of two ingredients, namely, an *inexplosive porous* substance, and nitro-glycerine, a reissue covering a compound of *all porous substances, whether explosive or inexplosive*, with nitro-glycerine, which would be equally safe for handling and use, was held to be void as being for a different invention. *Id.*

PLEADING.

1. PLEA TO THE JURISDICTION.—The beginning and conclusion of. *Leonard v. Grant*, 603.

POSSESSION.

1. TITLE BY ACTUAL POSSESSION.—Where a party claiming title under a conveyance by specific bounds is in actual possession and occupation of a mining claim of no greater extent than the laws allow him to hold, and is actually engaged in working the same, which claim is also distinctly marked out by lines of stakes on both ends and at the corners, so that the boundaries are easily seen and traced, a party entering upon such actual possession without prior right is a trespasser, and can gain no rights as against the possessor, although the latter may not have taken up and held the claim in all particulars in the mode required by law to enable him to maintain a constructive possession. *North Noonday M. Co. v. Orient M. Co.*, 503.

PRACTICE.

1. MOTION—APPEARANCE.—A general appearance and consenting to a continuance is a waiver of irregularity in the notice. *Marye v. Strouse*, 204.
2. FINDINGS OF FACT.—After a general finding of fact, judgment thereon, and the lapse of a term, special findings cannot be added to or substituted for the general finding. *Id.*
3. SAME.—A circuit court is not bound to make a special finding. *Id.*
4. BILL OF EXCEPTIONS.—Notwithstanding the rule of court requiring a bill of exceptions to be drawn up within ten days after the trial, a case may be excepted from its operation when it is just to do so. *Id.*
5. PETITION FOR REHEARING—PRACTICE.—A petition for a rehearing in a court of original jurisdiction, after entry of a final decree in an equity suit, is not an *ex parte* proceeding, and can only be presented on notice, and considered after the other side has had an opportunity to answer it. *Giant Powder Co. v. Cal. Vig. P. Co.*, 506.

See NEW TRIAL.

PRE-EMPTION AND PRE-EMPTOR.

1. RESIDENCE.—The pre-emption act requires a pre-emptor to inhabit the tract claimed by him, and this means to abide there—to actually reside upon the premises until the final proof and payment is made. *Aiken v. Ferry*, 79.
2. RIGHT TO CONTEST.—No one can be heard to question or contest the right of another to a patent for public land, until he shows some right in himself in or to the premises. *Id.*
3. PRE-EMPTION RIGHT.—The right of pre-emption is not an interest in the land, but the right to be preferred as a purchaser of a certain portion of the public domain, and it accrues when the settler has complied with the prerequisites of the act by making his settlement and filing his declaratory statement. *Id.*
4. PRE-EMPTOR, QUALIFICATION OF.—If a settler under the pre-emption act is a qualified pre-emptor at the time of filing his declaratory statement, he is entitled, as against the United States, to become the purchaser of the premises. *Id.*

5. PROPRIETOR OF LAND.—The term "proprietor," as used in the inhibition contained in section 10 of the pre-emption act (5 Stat. 455; sec. 2260, R. S.), means an absolute and legal owner; and therefore where one owns land in trust for another, or has entered public land with cash or scrip, but has not received a patent therefor, he is not such a "proprietor" thereof, and is therefore not thereby disqualified to acquire the right of pre-emption. *Id.*
6. PATENTEE, WHEN A TRUSTEE.—Upon an erroneous construction of the law relating to the qualification of a pre-emptor, the land office canceled the entry of A. and issued a patent to F., a junior settler, for a portion of the tract entered by A.: *Held*, that F. was a trustee for A. as to such portion, and must convey the same to him on receiving the purchase price thereof. *Id.*

See SOUTHERN PACIFIC RAILROAD.

PROBABLE CAUSE

See MALICIOUS ARREST.

PROMISSORY NOTES.

1. NEGOTIABLE INSTRUMENTS, POSSESSION OF.—The possession of a negotiable instrument imports, *prima facie*, that the holder acquired it *bona fide*, for value, in the usual course of business, without notice of any fact impugning its validity; and that he is the owner thereof and entitled to recover the contents from all prior parties thereto. *Bank Brit. N. A. v. Ellis*, 96.
2. SAME—CONSIDERATION OF.—Inquiry into the consideration of a negotiable paper can only be made between privies or the immediate parties thereto—as the maker and payee, or an indorser and his indorsee; all other parties are called remote, and as between them a consideration for making and indorsing the same is conclusively presumed; but a want of consideration may be shown by a defendant against a remote party, if the latter took the paper with the knowledge that such want could be shown against a nearer party. *Id.*
3. SAME—ACCOMMODATION MAKER OR INDORSER.—A party who makes or indorses a note without consideration and for the purpose of thereby lending his credit to another, is an accommodation maker or indorser, and cannot show a want of consideration therefor against any one except the accommodated party. *Id.*
4. DEFENSE, WANT OF CONSIDERATION.—A party to negotiable paper who seeks to make the want of consideration a defense to an action thereon, must not only allege such want of consideration, but also show how and why he is entitled to make such defense as against the plaintiff in any aspect of the case made in the complaint. *Id.*
5. INDORSER.—An indorser's contract and liability is separate and distinct from that of the maker's; he agrees that the instrument will be paid, by himself, if not by the maker, and as his own debt and not that of another. *Id.*
6. INDORSEMENT.—In the absence of anything to the contrary, an indorsement is presumed to have been made regularly, after the making of the instrument and the indorsement of the same by the payee and before its

maturity, and the indorser thereby becomes liable, as such, to any subsequent holder of the paper, whether he then had any interest in the same or not, unless there was an agreement that he should be liable only as guarantor, which was known to the holder at the time of acquiring the paper. *Id.*

7. **INDORSEES, DISCHARGE OF.**—When the holder of a negotiable instrument makes an early blank indorsement payable to himself, he does not thereby discharge subsequent indorsers from their liability as such. *Id.*
8. **PAYMENT BY NOTE.**—The note of a third person, given and received in payment of the debt of another, is a valid contract, and operates to extinguish and discharge the original debt; and a note given by a partner in payment of a debt of the firm, as to such debt, is the note of a third person. *In re Parker*, 248.
9. **SAME—BURDEN OF PROOF.**—To constitute an absolute payment of a pre-existing debt by a promissory note, there must be an agreement to receive it as such, and the burden of proof is upon the party alleging the fact. *Id.*

See ATTORNEY AND ATTORNEY'S FEES.

PUBLIC LANDS.

1. **DECISIONS OF THE LAND OFFICE.**—The action of the land office upon questions of fact arising in the course of its business, is conclusive upon other tribunals, unless it appears that such action is the result of fraud or mistake, other than an error of judgment in estimating the value of evidence, or making deductions therefrom; but for error in the construction or application of the law relating to such business, its decisions may be reviewed and modified or annulled by the courts. *Aiken v. Ferry*, 79.
2. **RESIDENCE.**—The pre-emption act requires a pre-emptor to inhabit the tract claimed by him, and this means to abide there—to actually reside upon the premises until the final proof and payment is made. *Id.*
3. **RIGHT TO CONTEST.**—No one can be heard to question or contest the right of another to a patent for public land, until he shows some right in himself in or to the premises. *Id.*
4. **PRE-EMPTION RIGHT.**—The right of pre-emption is not an interest in the land, but the right to be preferred as a purchaser of a certain portion of the public domain, and it accrues when the settler has complied with the prerequisites of the act by making his settlement and filing his declaratory statement. *Id.*
5. **PRE-EMPTOR, QUALIFICATION OF.**—If a settler under the pre-emption act is a qualified pre-emptor at the time of filing his declaratory statement, he is entitled, as against the United States, to become the purchaser of the premises. *Id.*
6. **PROPRIETOR OF LAND.**—The term "proprietor," as used in the inhibition contained in section 10 of the pre-emption act (5 Stat. 455; sec. 2260, R. S.), means an absolute and legal owner; and therefore where one owns land in trust for another, or has entered public land with cash or scrip, but has not received a patent therefor, he is not such a "proprietor" thereof, and is therefore not thereby disqualified to acquire the right of pre-emption. *Id.*
7. **PATENTEE, WHEN A TRUSTEE.**—Upon an erroneous construction of the law relating to the qualification of a pre-emptor, the land office canceled

the entry of A. and issued a patent to F., a junior settler, for a portion of the tract entered by A.: *Held*, that F. was a trustee for A. as to such portion, and must convey the same to him on receiving the purchase price thereof. *Id.*

8. **STATUTE OF FRAUDS.**—A parol contract in relation to lands, if set out in the bill, is to have the same effect, as against the plaintiff, as if it had been made in writing. *Id.*
9. **TOWN SITE.**—The occupation of a tract of land as a town site for the purposes of business or trade, which is afterwards abandoned, does not impress upon the locality the character or quality of a town site, so that the same cannot be taken up and held under the donation act as unoccupied public land. *Bear v. Luce*, 148.
10. **SUIT TO AFFECT A PATENT.**—Equity does not have jurisdiction to affect a patent except upon the ground of an antecedent equity in the plaintiff which was disregarded in the issuing thereof, and therefore a party who claims to have settled upon a tract of public land subsequent to the settlement and entry thereof by another who has received the patent for the same, upon the ground that the settlement and entry of the patentee were illegal and void, cannot maintain a suit to set aside such patent or charge the patentee as his trustee of the premises. *Id.*
11. **QUESTIONS OF FACT—DECISIONS OF THE LAND DEPARTMENT.**—Questions of fact decided in the land department are not subject to review by the courts, except for fraud or mistake other than an error of judgment; and where there is a contest in such department between one who claims to be a settler upon a portion of the public land, to cancel the entry of a prior settler upon the same land, the decision therein precludes further inquiry by the parties into any question of fact which might properly have been made in such contest, the same as if it had been actually so made and considered. *Id.*
12. **SAME—QUESTION OF LAW.**—Whether a settler under the donation act upon unsurveyed lands could commute his residence thereon, under section 1 of the acts of February 14, 1853, and July 17, 1854, by the payment of one dollar and twenty-five cents an acre therefor, is a question of law, and therefore the decision of the land department thereon may be reviewed by this court upon the suit of a party having an equity in the premises prior to such entry, but not otherwise, except in a suit by the United States to cancel the patent issued upon such entry. *Id.*

See **MISSIONS OF OREGON; SOUTHERN PACIFIC RAILROAD; TOWN SITES**, 2.

PUBLIC MONEY.

See **OFFICIAL BONDS**.

PUBLIC USE.

1. **DEDICATION OF LAND TO PUBLIC USES.**—A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes, by the owner, manifested by some clear declaration of the fact. *Grogan v. Town of Hayward*, 498.
2. **REVOCATION OF DEDICATION.**—Such dedication is irrevocable when third parties have been induced to act upon it, and part with value in consideration of it; although the property is not at once subjected to the uses

designated, and the dedication has not been formally accepted by the public authorities. *Id.*

3. **SALE BY MAP DEDICATION.**—A sale of property, in a place laid out as a town, by reference to a map on which streets and public grounds are designated, is a sale, not merely for the price named in the deed, but for the further consideration that the streets and public grounds shall remain forever open to the purchaser, and to any subsequent purchasers in the town. The purchaser takes not merely the interest of the grantor in the land, but, as appurtenant to it, an easement in the streets and public grounds named, with an implied covenant that subsequent purchasers shall be entitled to the same rights. *Id.*

RECLAMATION OF SWAMP LANDS.

See SWAMP LANDS.

REDEMPTION.

1. **REDEMPTION.**—The Or. Civ. Code, sections 410-414, provides that in a suit to enforce the lien of a mortgage, subsequent incumbrancers must be made parties thereto, and that the decree therein shall ascertain and determine the amount and priority of the liens of all such parties, and direct that the premises be sold and the proceeds applied to the satisfaction of the debts secured thereby in the order specified therein; and that process to enforce such decree should issue upon the joint application of the parties or the order of the court: *Held*, that a sale in pursuance of such decree was a sale in pursuance of the decree and upon the process of each of the lien creditors provided for in the decree, and extinguished their liens, and therefore neither of them had a right to redeem the premises from the purchaser at such sale under section 297 of said code, which gives the right of redemption only to a creditor having a lien upon the property sold. *Lauriat v. Stratton*, 339.
2. **STATE DECISION.**—It is the law of the national courts that in the application of a statute of the state or a rule of law concerning the title to real property, they will follow the settled construction of the statute or application of the rule made by the highest court of the state; but where there is but one decision of such court, which clearly appears to have been made upon a misapprehension of the terms of the statute and against the plain letter and purpose of it, the court declines to follow it. *Id.*
3. **REDEMPTION BY JUDGMENT DEBTOR.**—Under sections 300 and 301 of the Or. Civ. Code, a redemption by a judgment debtor or his successor in interest, whether made before or after the confirmation of the sale, terminates the effect thereof, and no further redemption can be had thereon or by reason of it. *Id.*

REMOVAL OF CAUSES.

1. **REMOVAL OF CAUSES UNDER ACT OF 1875.**—Under the first clause of the second section of the act of 1875, which reads, "in any suit of a civil nature * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit," it is necessary, to authorize a removal, that all the parties on one side shall

be citizens of different states from those on the other side of the controversy. But to determine the right of removal the parties may be transposed and arranged on opposite sides of the controversy according to their real interests, without regard to their formal position on the record as plaintiffs or defendants. *Burke v. Flood*, 220.

2. REMOVAL UNDER SECTION 639, R. S.—B., a citizen of California, filed his bill in equity as a stockholder therein against the C. V. M. Co., a California corporation, the P. W. L. & F. Co., also a California corporation; F., a citizen of California, and M. & F., citizens of Nevada, all the latter being stockholders and officers or agents of both corporations, for an account between said corporations, and between the P. W. L. & F. Co., and F. M. and F., and for a recovery from said defendants by the C. V. M. Co. of a large amount of profits on numerous contracts alleged to have been fraudulently made in pursuance of a conspiracy, through defendants, F., M., F., and O'B., acting as officers and agents of both corporations, and which profits came to the possession of F., M., F., and O'B., in dividends from P. W. L. & F. Co., the parties other than the corporations being copartners in business, and their acts complained of being their joint acts for their joint benefit as such copartners. The suit having been removed from a state court to the United States circuit court as to M. & F., citizens of Nevada, under section 639, R. S., on motion to remand: *Held*, that there could not be a final determination of the whole controversy as to M. & F. without the presence of the P. W. L. & F. Co. and F., and that for this reason the suit was not removable as to M. & F., under the provisions of said section. *Id.*
3. REMOVAL.—A suit brought in a court of the state of Nevada by a citizen of California against a citizen of England may be removed into the circuit court of the United States under the act of March 3, 1875. *Eureka Con. Min. Co. v. Richmond Min. Co.*, 471.
4. REMOVAL OF CAUSE.—Under the second clause of section 2 of the act of March 3, 1875, any suit mentioned therein is removable whenever it involves a controversy wholly between citizens of different states and which can be fully determined as between them, upon the petition of either one or more of the plaintiffs or defendants actually interested in such controversy, and it is immaterial whether such controversy is considered the main or principal one in the suit or not, or what other controversies or parties are incidentally or otherwise involved in it. *Bybee v. Hawke*, 593.

RES ADJUDICATA.

1. ADMINISTRATION—JURISDICTION TO GRANT.—By the constitution of this state, the county court is a court of record with general jurisdiction of probate matters, to be regulated by law (art. 7, secs. 1 and 12); and by statute (Civ. Code, sec. 869) it has the exclusive power to grant letters of administration upon the estate of a person who at or immediately before his death was an inhabitant of the county: *Hell*, 1. That a decree of the county court of Multnomah county, granting letters to D. upon the estate of P., by which it appears to have been adjudged by said court upon a proper petition that P. was an inhabitant of the county at or immediately before his death, cannot be questioned collaterally on the ground that P. was not in fact such inhabitant; 2. That said court having

general jurisdiction of the subject-matter—the granting of administration upon the vacant estate of a deceased person—it had the authority to inquire and determine whether, in that particular case, the deceased was an inhabitant of the county or not, and that its decision upon the question is conclusive, except upon appeal; and, 3. That a subsequent decree by the county court of another county granting letters of administration upon the same estate to H., while the first was in full force and effect, is null and void. *Holmes v. O. & C. R. Co.*, 262.

2. **RES ADJUDICATA.**—Where in an action at law the plaintiff alleges a conspiracy among sundry parties, defendants to the action, by means of which a large amount of real estate of the plaintiff has been fraudulently sold, and the proceeds appropriated by the alleged conspirators; and upon issues taken upon all the allegations of the complaint, a trial is had and all the issues found in favor of the defendants, and final judgment entered upon the verdict, the matters so in issue, found, and adjudged, are *res adjudicata*, and conclusive of the rights of the parties. *Price v. Dewey*, 493.
3. **SAME.**—Where the complainant in a bill in equity alleges matters before set up and determined in an action at law, as stated in the last head-note, and prays an account of the proceeds of the real estate alleged to have been fraudulently disposed of, and a decree for the amount, a plea setting up the former adjudication is a valid plea in bar to the bill. *Id.*
4. **SAME.**—The fact that at the time of the commencement of the former action, the defendants had not disposed of all the real estate, the title to which they had acquired by means of the alleged fraudulent practices, does not affect the conclusiveness of the prior adjudication. *Id.*
5. **SAME—SUBSEQUENTLY DISCOVERED EVIDENCE.**—Nor does the fact that the complainant commenced and tried the former action before he discovered or obtained all the evidence that he claims to have since found to establish the alleged fraudulent acts—the said evidence being matters of public record, or otherwise open to discovery upon diligent inquiry—affect the conclusiveness of the determination. *Id.*

RESERVATIONS.

1. **RESERVATION.**—The tract of country called the "Pyramid Lake Indian Reservation" has been set apart by competent authority for the use of the Pah Utes and other Indians residing thereon. *United States v. Leathers*, 17.
2. **SECTION 2147, R. S., TITLE "INDIANS," CONSTRUED.**—The president having set apart the Pyramid Lake reservation for the use of Indians, the whites who go upon the reservation to fish, do so "contrary to law," within that section. *United States v. Sturgeon*, 29.

RESIDENCE.

See PUBLIC LANDS, 2.

RESISTING UNITED STATES MARSHAL.

See CRIMINAL LAW, 10, 13, 14, 15, 19, 20.

RETURN.

1. **AMENDED RETURN.**—In the absence of legislation to the contrary, a court has the discretion to permit an officer to amend a return with or without notice, and at any time after the date thereof, so as to bind the parties to the action or those claiming under them as privies. *Rickards v. Ladd*, 40.
2. **SAME—THIRD PERSONS.**—But a court cannot authorize a return to be amended so as to affect the rights of third persons acquired in good faith prior to such amendment. *Id.*
3. **SAME—WHEN CONCLUSIVE.**—An amended return, as between the parties to the action, or their privies, whether made with or without notice, cannot be questioned by them collaterally. *Id.*

SALVAGE.

1. **SALVOR, UNDERTAKING OF.**—A salvor does not undertake to succeed in saving the property in peril, but only that he will exercise ordinary skill and diligence in the use of the means or machinery with which he undertakes the salvage service. *The Allegiance*, 68.
2. **DUTY OF THE TOW.**—It is the duty of the vessel in tow to keep in proper trim and tack, to follow the tug and steer accordingly, and if injury results to the tow from negligence or mistake in these respects, the tug is not responsible. *Id.*
3. **SALVAGE BY A STEAM-TUG—COMPENSATION FOR.**—Owing to its comparative independence of the winds and currents, a steam-tug may perform a salvage service with comparative safety to herself, and therefore the matter of risk to herself and crew is to be estimated accordingly, in fixing the value of such service. *Id.*
4. **SALVAGE SERVICE, COMPENSATION FOR.**—A steam-tug of three hundred and four horse-power left Baker's bay, and overtook an iron ship of one thousand two hundred and thirty-five tons, worth forty-seven thousand dollars, drawing twelve feet of water, in ballast, drifting on to the west end of Chinook spit in seventeen feet of water at flood tide, near two hours before high water, with the wind blowing about eight from the south-south-east, and took her hawser and towed her under the lee of the east end of Sand island, where, owing to the strength of the wind, which had increased to ten and veered to south-east by south, she was compelled to let her go in comparatively safe anchorage in twenty-three feet of water; but the ship, only letting go one anchor, dragged on to the spit, where she lay until next morning in about four or five feet of water at low tide, when the tug, and three others of near the same power and working under the same management, returned to her and pulled her off about two hours before high water, with a light breeze from the east by south, and the ship heading south by east, without any serious risk to the tugs or actual injury thereto: *Held*, that the service was a salvage service, and the compensation therefor fixed at five thousand dollars. *Id.*

SCHOOL FUND.

1. **SCHOOL FUNDS.**—In 1858, the only fund which a county treasurer was authorized by law to loan was the common school fund in his custody,

arising from the sale of sections 16 and 36, and in doing this he was the agent of the territory—the trustee of the fund—and not the county, and a suit to enforce the obligation of such note and mortgage should have been brought in the name of such treasurer. *Alexander v. Knox*, 54.

SEAMEN.

1. SICK OR INJURED SEAMEN.—The hospital service of the United States is not intended to supersede the marine law, which imposes an obligation on a vessel to take care of a seaman falling sick or becoming injured in its service, but only auxiliary thereto. *The Chandos*, 544.
2. SAME.—A seaman injured in the service of a vessel, without his fault, is entitled to be taken care of, at the expense of the vessel, until the end of the voyage, and longer, if necessary to effect a cure, so far as the same can be done by the use of the ordinary medical means; and the fault which will exempt a vessel from such liability is not mere ordinary negligence consistent with good faith, but some positively vicious conduct, such as gross negligence or willful disobedience of orders. *Id.*
3. NEGLECT TO SEND SEAMAN TO HOSPITAL.—Damages allowed for neglecting to send libellant to the marine hospital at Portland, at the expense of the ship, for twelve days after her arrival in the Columbia river. *Id.*

See ADMIRALTY, 16.

SELF-DEFENSE.

See CRIMINAL LAW, 17, 18.

SHERIFF.

1. AMENDED RETURN.—In the absence of legislation to the contrary, a court has the discretion to permit an officer to amend a return with or without notice, and at any time after the date thereof, so as to bind the parties to the action or those claiming under them as privies. *Richards v. Ladd*, 40.
2. SAME—THIRD PERSONS.—But a court cannot authorize a return to be amended so as to affect the rights of third persons acquired in good faith prior to such amendment. *Id.*
3. SAME—WHEN CONCLUSIVE.—An amended return, as between the parties to the action, or their privies, whether made with or without notice, cannot be questioned by them collaterally. *Id.*

SOUTHERN PACIFIC RAILROAD.

1. SOUTHERN PACIFIC RAILROAD GRANT.—The road, to aid the construction of which a land grant was made to the Southern Pacific Railroad Company by the act of congress of July 27, 1866, incorporating the Atlantic and Pacific Railroad Company, was intended by congress to be a road connecting with the contemplated Atlantic and Pacific road at such point on said road near the intersection of the thirty-fifth parallel of latitude and the eastern line of the state, as the Southern Pacific Railroad Company should deem most suitable for a railroad line from said point of connection to San Francisco; the said point of connection and the line of road thence to San Francisco to be determined and located by the Southern Pacific Railroad Company. *S. P. R. Co. v. Orton*, 157.

2. **LOCATION OF ROAD.**—The line of the road designated on the plat thereof, filed by the Southern Pacific Railroad Company in the office of the commissioner of the general land office on January 3, 1867, is located in pursuance of the terms of said act of congress, and is properly located under said act. *Id.*
3. **EFFECT OF GRANT AND FILING PLAT.**—The grant made by said act is a *present general* grant of the quantity of land specified in the act; and immediately upon filing the plat, the *general* grant became *specific*, and attached to all the odd sections of land situate within the prescribed limits on each side of the designated line, then owned by the government, to which no other right had attached prior to the filing of said plat. *Id.*
4. **WITHDRAWAL FROM PRE-EMPTION.**—Immediately upon the filing of the plat, the odd sections designated were withdrawn from pre-emption or other disposition, by force of the act itself, *proprio vigore*, without any order of the secretary of the interior, or notice other than that afforded by the filing of the plat itself. *Id.*
5. **SAME.**—The lands having been set apart to aid in the construction of a railroad, and absolutely and unconditionally withdrawn from pre-emption, no pre-emption right could be acquired in them while so situated, even if the grantee at the time was unauthorized under the state law to take a perfect title. *Id.*
6. **POWER OF SECRETARY TO RESTORE LANDS WITHDRAWN FROM PRE-EMPTION.**—The withdrawal of the lands from pre-emption by the statute being absolute and without conditions, the secretary of the interior had no power to repeal or modify the statute, or restore the lands to their former condition. The withdrawal being unconditional by force of the statute, they could only be reopened to pre-emption by statutory authority. *Id.*
7. **TITLE OF CORPORATION TO LANDS—TRESPASSERS.**—Where a corporation, authorized to receive grants of land for the purposes of the corporation, brings an action against a trespasser to recover possession of lands granted to it, such trespasser will not be heard to question the title of the corporation, on the ground that it had no authority to take them. This is a question between the state and the corporation. *Id.*
8. **MISUSE OF CORPORATE FRANCHISE.**—Whether a corporation has misused or abused its franchise is a question between the state and the corporation, which cannot be raised or litigated in an action between the corporation and private parties. *Id.*
9. **ACT OF APRIL 4, 1870, CONSTITUTIONAL.**—The act passed by the legislature of California, April 4, 1870, authorizing the Southern Pacific Railroad Company to change the line of its road, accept the congressional grant of land, and construct its road as provided in the act of congress incorporating the Atlantic and Pacific Railroad Company, was not passed in violation of section 31, article IV of the constitution of California, providing that corporations "shall not be created by special act, except for municipal purposes." *Id.*
10. **CONSTRUCTION OF STATE CONSTITUTIONS.**—The settled rule of construction of state constitutions is that they are not special grants of powers to legislative bodies, but *general* grants of all legislative powers not actually prohibited or expressly excepted. It is equally well settled

that the *exception* must be *strictly* construed. The construction is *strict* against those who stand on the *exception*, and *liberal* in favor of the government itself. *Id.*

11. SAME.—Under the established rule of strict construction, applicable to state constitutions, an act of the legislature should never be declared unconstitutional, unless there is a clear repugnance between the statute and the organic law. *Id.*
12. ESSENTIAL ATTRIBUTES OF A CORPORATION.—The essence of a corporation consists only of a capacity to have perpetual succession under a special denomination, and an artificial form; and to take, hold, and grant property, contract obligations, and sue and be sued by its corporate name; and a capacity by its corporate name to receive and enjoy in common, grants of privileges and immunities. *Id.*
13. CORPORATION A FRANCHISE.—The right to be a corporation is a distinct, independent franchise, complete within itself, having no necessary connection with other distinct franchises, which are the subjects of legislative grant, and which may, or may not be given to corporations once created, as well as to natural persons, as to the legislature may seem advisable. *Id.*
14. CORPORATE POWERS, strictly speaking, are such as are peculiar to corporations, and essential to their being, and not such powers as are usually, or may be, possessed and enjoyed indifferently by corporations and natural persons. *Id.*
15. THE CREATION OF A CORPORATION is the bringing into being of an artificial person having the essential attributes of a corporation—the creation of the distinct and independent franchise called a corporation—which, when created, has a capacity, among other things, by its corporate name, to receive and enjoy such other franchises, privileges, and immunities, property and rights, as the legislature itself, or other persons, with its permission, may grant to it. *Id.*
16. FRANCHISES, ETC., GRANTED TO A CORPORATION.—The granting of independent franchises, other than the specific franchise constituting a corporation, and of other privileges and powers, to a pre-existing corporation, are not acts creative of a corporation, but acts regulating the conduct of the existing corporation in its relation to and intercourse with the public and other persons, natural and artificial. *Id.*
17. THE GIVING OF AUTHORITY TO CHANGE THE LINE OF ITS ROAD to the Southern Pacific Railroad Company, a pre-existing corporation, by the act of April 4, 1870, is not an act creating a corporation, in whole or in part, and is not the creation of a new corporate power. *Id.*
18. STATE CONSTITUTIONS—SETTLED CONSTRUCTION.—The settled construction of the provisions of a state constitution by the highest court of the state, when not in conflict with any provision of the constitution of the United States, will be adopted and followed by the national courts, whatever their opinion may be as to the correctness of such settled construction. *Id.*
19. CONFLICTING CONSTRUCTIONS.—In 1863, the supreme court of California construed a provision of the state constitution, which construction remained unquestioned by the courts for eleven years, during which time much legislation of a similar character to that in question, and among it

that involved in this case, was had, under which important rights had become vested. In 1874, the supreme court, being differently constituted, overruled the prior decision, three of the six justices who sat in the two cases having taken one view, and three the other. The supreme court is now to be again reorganized, with seven members, only one of whom has considered the question as a member of the court of last resort: *Held*, that the construction is *not settled* within the rule, and the national courts are at liberty to adopt the view which appears to them correct. *Id.*

20. AMENDED ARTICLES OF ASSOCIATION were filed by the Southern Pacific Railroad Company, in pursuance of the provisions of a general act of the legislature of California, passed March 1, 1870, applicable to all corporations before created, or to be thereafter created: *Held*, that if the act of April 4, 1870, is void, the plaintiff had full authority to build the road under said act of March 1, and the amended articles of association, filed in pursuance of its provisions. *Id.*
21. JOINT RESOLUTION CONSTRUED.—The "actual settlers," whose rights are directed to be saved by the joint resolution of congress, passed June 28, 1870, are those who had settled before, and who had existing vested rights at the date of the filing of the plat, and not those who afterwards settled upon the land. The latter could acquire no rights. The grant being a present grant, which attached to the specific lands at the date of the filing of the plat, congress could not divest the rights of the plaintiff, which had once vested, under the act, upon the filing of the plat, except by proper proceedings upon failure of defendant to perform the conditions subsequent. *Id.*
22. CAL. STATE TEL. CO. V. ALTA TEL. CO., 22 CAL. 398, AND SAN FRANCISCO V. S. V. WATER WORKS, 48 ID. 493, considered, and the former approved. *Id.*

STAMPS.

See DISTILLED SPIRITS, 1.

STATUTES CONSTRUED.

- R. S., Secs. 2133 and 2139. Indians, 17.
- R. S., Sec. 2147. Indians, 29.
- R. S., Sec. 721. Statute of Limitations, 31.
- Act July 8, 1870, 16 Stat. 206. Patents, 31.
- R. S., Sec. 5596. Patents, 31.
- Art. IV, Sec. 22, Constitution of Oregon, 31.
- R. S., Sec. 4189. Forfeiture, 106.
- R. S., Sec. 639. Removal of Causes, 220.
- Act March 3, 1875. Removal of Causes, 220.
- Constitution, XIVth Amendment. China, 348.
- R. S., Secs. 738 and 739. Assignee in Bankruptcy, 585.
- Act March 3, 1825. Larceny on Vessel, 640.
- Oregon Civil Code, Sec. 367. Damages for Death, 262.
- Oregon Civil Code, Sec. 869. Jurisdiction of Administrator, 262.
- Oregon Code, Sec. 495. Divorce, 473.
- Oregon Donation Act, 48, 54, 113, 148.
- R. S., Sec. 2387. Town Site, 390.

Nevada Stat., Secs. 3857, 3862. Comp. L. Town Site, 391.
 Oregon Constitution, Sec. 22, Art. IV. Amendment of Statute, 31.
 R. S., Sec. 2321. Proof of Citizenship. Miner, 503.
 R. S., Chap. 6. Mining Law, 503.
 R. S., Sec. 2447. Survey of Public Land, 126.
 Act Aug. 14, 1848, Stat. at L., 323. Missionary Lands, 126.
 Act July 27, 1866. Atlantic and Pacific R. R. Grant, 157.
 California Statutes relating to S. P. R. Co., 157.
 California Statutes on Reclamation Swamp Lands, 567.
 R. S., Sec. 1977. Civil Rights, 349.
 Chinese Treaty, 16 Stat. U. S., 349, 740.
 U. S. Constitution, Sec. 2, Art. II, and Sec. 10, Art. I. Treaty, 349.
 Constitution U. S., XIVth Amendment, 349.
 Constitution California, Art. XIX. Chinese, 442, 349.

SWAMP LANDS.

1. **STATUTE OF LIMITATIONS.**—The owner of the land is not in a position to set up, as a defense to an action to recover the assessment, the fact that a portion of the indebtedness of the reclamation district for reclaiming the land, payable out of the assessment when collected, is barred by the statute of limitations. *Reclamation District v. Hagar*, 567.
2. **COUNSEL FEES A PROPER CHARGE.**—Counsel may be employed, in the sound discretion of the officers of the reclamation district, to aid the district attorney of the county in prosecuting actions to collect the assessments, notwithstanding the fact that the statute makes it the duty of the district attorney to prosecute such actions; and the reasonable fees of counsel so employed are properly a part of the "incidental expenses" which the statute authorizes to be paid out of the fund raised by the assessment. *Id.*
3. **RECLAMATION AT EXPENSE OF LAND.**—Under the constitution of California the legislature has power to authorize the formation of reclamation districts for the reclamation of swamp lands at the expense of the lands reclaimed and benefited. *Id.*
4. **SAME.**—The legislature also has power to include in such reclamation districts to be so reclaimed, swamp lands held under Mexican grants, as well as those the titles to which are derived through the state under the act of congress granting to Arkansas and other states the swamp lands situated within their limits. *Id.*
5. **THE POWER TO RECLAIM SWAMP LANDS** is not derived from the Arkansas act; and there is no contract in that act, express or implied, on the part of the state, that it will not reclaim other swamp lands, or that it will limit the expense of reclaiming the swamp lands of the state to the proceeds of the sales of the lands derived under that act. *Id.*
6. **THE SWAMP LANDS HELD UNDER MEXICAN GRANTS**, as well as those derived under the Arkansas act, are included in the provisions of the act of 1868, and of the political code authorizing the reclamation of swamp lands. *Id.*
7. **STATE STATUTES—AUTHORITATIVE CONSTRUCTION.**—The construction by the highest court of a state of a state constitution, or statute, which does not trench upon any of the powers of the national government, or upon

any right protected by the constitution of the United States, is authoritative and conclusive in the national courts. *Id.*

8. **IMPAIRING OBLIGATION OF CONTRACT.**—The statute of California providing for the reclamation of swamp lands impairs no contracts between the United States and the state of California, nor of the state of California and purchasers of swamp lands, nor any contracts of owners of lands held under Mexican grants, or other patents from the United States, nor of any contract found in the charter or by-laws of Reclamation District No. 108. *Id.*
9. **COIN ASSESSMENT—OBLIGATION OF CONTRACT.**—Authorizing the assessment to be collected in coin, where the indebtedness of the reclamation district for reclaiming the land might be paid in other lawful money, does not impair the obligation of a contract. *Id.*

TOWING AND TOWAGE.

See SALVAGE.

TOWN SITE.

1. **TOWN SITE.**—The occupation of a tract of land as a town site for the purposes of business or trade, which is afterwards abandoned, does not impress upon the locality the character or quality of a town site, so that the same cannot be taken up and held under the donation act as unoccupied public land. *Bear v. Luse*, 148.
2. **TOWN-SITE ACT CONSTRUED—EQUITY JURISDICTION.**—Where Berry, who had entered land for a town site under section 2387, R. S., conveyed a portion of it to an occupant, and thereafter sued in equity to recover the price and to establish a vendor's lien therefor as against F., T., and D., who had purchased the same land at an execution sale: *Held*, that the complainant, Berry, had no vendor's lien, and that, having failed to establish a right to the equitable relief demanded, he could have no decree in equity for the purchase money. *Berry v. Gimaca*, 390.

TREATY.

1. **HABEAS CORPUS—JURISDICTION.**—Where an alien prisoner, held in custody in execution of a judgment rendered by a state court convicting him of an offense created by a state statute, alleges in his petition that the statute under which he is convicted was passed in violation of the constitution of the United States, and of the provisions of a treaty of the United States with the nation of which he is subject, the circuit court has jurisdiction on a writ of *habeas corpus* to inquire into the validity of the statute and judgment, and, if found to be in violation of such constitution and treaty, is authorized to discharge the petitioner from such custody. *In re Wong Yung Quy*, 237.
2. **TREATY-MAKING POWER.**—Under section 10, article I of the constitution of the United States, and section 2, article II, the treaty-making power has been surrendered by the states to the national government, and vested in the president and senate of the United States. *Parrott's case*, 349.
3. **TREATIES, EFFECT OF.**—Under article VI, the constitution of the United States, and laws made in pursuance thereof, and treaties made under its

- authority, are the supreme law of the land, and the judges in every state, both state and national, are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. *Id.*
4. **CHINESE TREATY WITHIN TREATY-MAKING POWER.**—The provisions of articles V and VI of the treaty with China of June 18, 1868, recognizing the right of the citizens of China to emigrate to the United States for purposes of curiosity, trade, and permanent residence, and providing that Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel and residence as may be enjoyed by the citizens or subjects of the most favored nation (16 Stat. 740), are within the treaty-making power conferred by the constitution upon the president and senate, and are valid, and constitute a part of the supreme law of the land. *Id.*
 5. **CONSTITUTION OF CALIFORNIA—TREATY.**—Any provision of the constitution or laws of California in conflict with the treaty with China is void. *Id.*
 6. **SECTION 2 OF ARTICLE XIX OF THE CONSTITUTION OF CALIFORNIA,** providing that no corporation formed under the laws of the state shall, directly or indirectly, in any capacity, employ any Chinese or Mongolian, and requiring the legislature to pass such laws as may be necessary to enforce the provision, is in conflict with articles V and VI of said treaty with China, and is void. *Id.*
 7. **ACT MAKING IT AN OFFENSE TO EMPLOY CHINESE.**—The act of February 13, 1880, to enforce said article of the constitution making it an offense for any officer, director, agent, etc., of a corporation to employ Chinese, violates the treaty with China, and is void. *Id.*
 8. **THE PRIVILEGES AND IMMUNITIES** which, under the treaty, the Chinese are entitled to enjoy to the same extent as enjoyed by the subjects of the most favored nation, are all those rights which are fundamental, and of right belong to citizens of all free governments; and among them is the right to labor, and to pursue any lawful employment in a lawful manner. *Id.*
 9. **LABOR—PROPERTY.**—Property is everything which has an exchangeable value. Labor is property, and the right to make it available is next in importance to the right to life and liberty. *Id.*
 10. **FOURTEENTH AMENDMENT TO NATIONAL CONSTITUTION.**—The provisions of article XIX of the constitution of California, and said act of the legislature passed to enforce it, prohibiting the employment of Chinese, are also in conflict with the provisions of the fourteenth amendment to the constitution of the United States, and are void on that ground. *Id.*
 11. **SAME.**—Said provisions are in conflict with that part of the said fourteenth amendment which provides that no state shall deprive any person of life, liberty, or property, without due process of law. *Id.*
 12. **SAME.**—They are also in conflict with that portion of said amendment which provides that no state shall deprive any person within its jurisdiction of the equal protection of the laws. *Id.*
 13. **CHINESE OR MONGOLIANS** residing within the jurisdiction of California are "persons," within the meaning of the term as used in the said fourteenth amendment to the constitution. *Id.*
 14. **SECTION 1977 OF THE REVISED STATUTES OF THE UNITED STATES** was passed in pursuance of said fourteenth amendment, and to give it effect;

- and said constitutional and statutory provisions of the state of California are in conflict with said provision of the R. S. *Id.*
15. DISCRIMINATING LEGISLATION by a state against any class of persons, or against persons of any particular race or nation, in whatever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws, and is prohibited by the fourteenth amendment. *Id.*
 16. CONSTITUTION—DISINTERMENT OF CHINESE.—The statute of California, making it an offense to disinter or remove from the place of burial the remains of any deceased person without a permit, for which a fee of ten dollars must be paid, does not violate subdivision 3 of section 2, article I of the constitution of the United States, providing that "congress shall have power to regulate commerce with foreign nations." *In re Wong Yung Quy*, 442.
 17. SAME.—Nor does it violate subdivision 2 of section 10, article I, providing that "no state shall, without the consent of congress, lay any impost or duties on * * * exports." *Id.*
 18. SAME.—Nor is it in conflict with the fourteenth amendment, which prohibits any state from denying to "any person within its jurisdiction the equal protection of the laws." *Id.*
 19. SAME—TREATY WITH CHINA.—Nor does it violate the fourth article of the treaty with China, called the Burlingame treaty, which provides that "Chinese subjects in the United States shall enjoy entire liberty of conscience, and shall be exempt from all disability or persecution on account of their religious faith or worship." (16 Stat. 740.) *Id.*
 20. SAME.—The act is a sanitary measure within the police powers of the state, and as such is valid. *Id.*
 21. A CORPSE IS NOT PROPERTY, and the remains of human beings carried out of the state for burial in a foreign country are not exports within the meaning of the clause of the national constitution prohibiting the laying of imposts or duties by the state upon exports. *Id.*
 22. CHINESE TREATY—CONSTITUTION.—The statute of California, prohibiting all aliens incapable of becoming electors of the state from fishing in the waters of the state, violates the fourteenth amendment of the constitution of the United States, also articles V and VI of the treaty with China, and is void. *In re Ah Chong*, 451.

See CONSTITUTIONAL LAW.

TRUSTS AND TRUSTEES.

1. CESTUI QUE TRUST.—In a suit by or against trustees concerning the trust property, the *cestuis que trust* are necessary parties. *Lauriat v. Stratton*, 339.

See COUNTY, 2; EQUITY; PRE-EMPTION, 7; TOWN SITE, 2.

VENDOR'S LIEN.

1. VENDOR'S LIEN.—Upon the sale of real property, on credit, without collateral security, the vendor has a lien upon the same for the unpaid purchase money, unless it was waived by the express agreement of the parties; and such lien exists and may be enforced against all persons claiming under the vendee with notice that the purchase money is unpaid. *Coos Bay W. R. v. Crocker*, 574.

2. **ASSIGNMENT.**—The assignment and acceptance of a contract for the sale of real property does not make the assignee personally liable for the purchase money due thereon; and as against him the vendor's remedy is confined to the enforcement of his lien on the property. *Id.*
3. **CONTRACT—ENTIRE OR SEVERABLE.**—Whether a contract is entire or severable depends upon the intention of the parties, to be gathered from the circumstances of the case. *Id.*
4. **SAME.**—A contract to sell ninety-six thousand acres of wild land, of different grades and values, lying substantially in a body, at an average price of one dollar per acre, to be conveyed and paid for as and when the same is surveyed and patented to the grantee by the United States, is not as many distinct contracts as there may be conveyances and payments in pursuance thereof, but only one entire contract, and therefore the vendor's lien for any portion of the purchase money thereof remaining unpaid extends to and may be enforced against the whole tract. *Id.*

WHITE PERSON.

See NATURALIZATION.

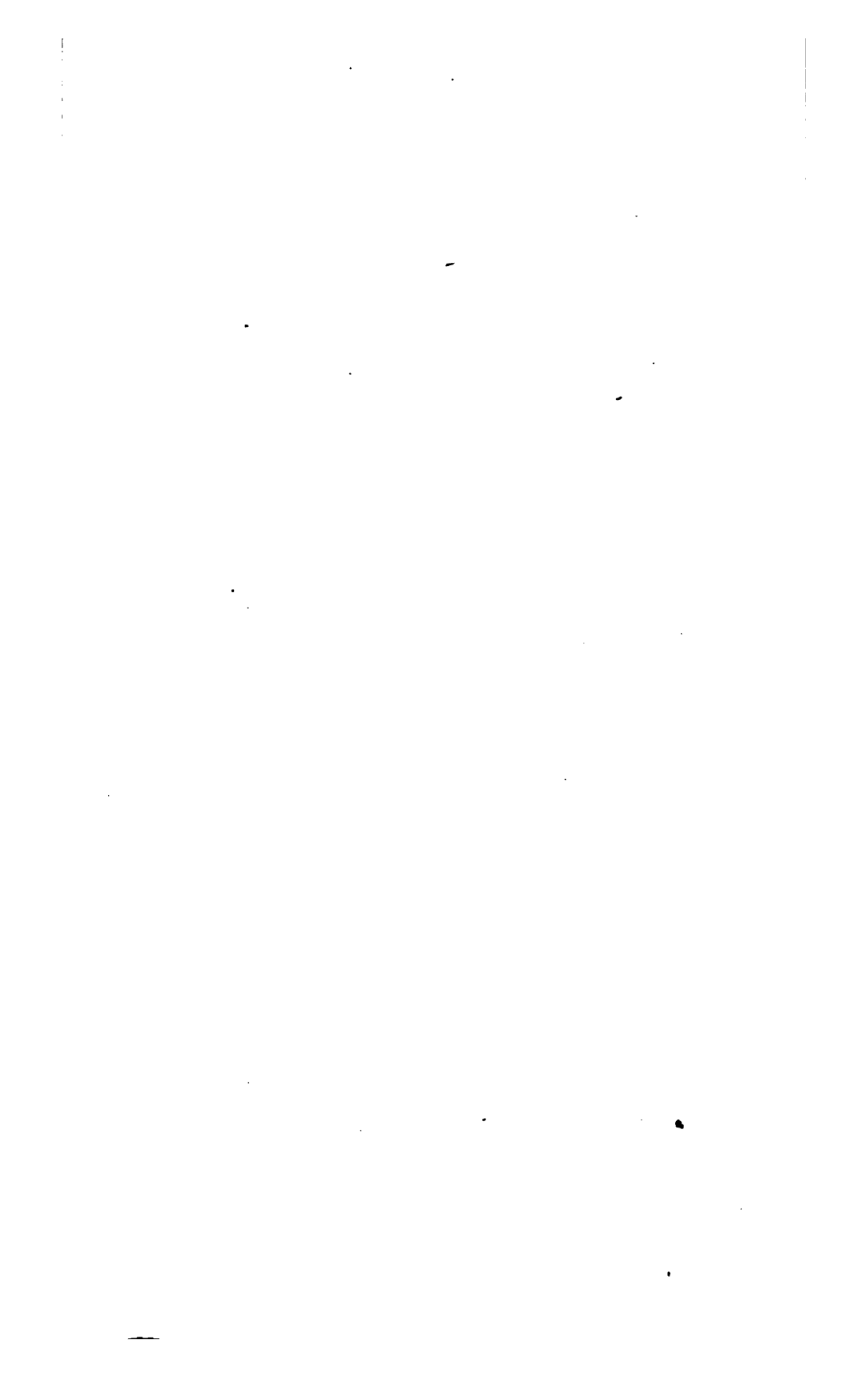
WIFE.

See DONATION ACT.

WRIT.

See RETURN.





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